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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1952.

No. 843

ROBERT KRAUSE, LAWRENCE MILLER, THOMAS J. McMANUS, JR., FRANCIS HIGGINS, and JOSEPH GOLDBERG,

Petitioners,

vs.

WILLIAM G. BUCHER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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CHAMPLIN-SHEALY COMPANY, CHICAGO 365

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I.

The decision of the United States Court of Appeals for the Seventh Circuit, affirming the judgments of the District Court as to certain of the defendants (the petitioners herein), is contrary to numerous well settled principles of law and not in accord with the applicable decisions of this court, and, on issues as to which local law controls, is contrary to the applicable decisions of the highest court of the State of Illinois 42-92

A. The uncontradicted evidence establishes that the conduct of the defendants was in every respect lawful, namely: (1) that plaintiff's arrest was made upon adequate probable cause; (2) that his shooting and wounding was a direct result of his violent resistance to a lawful arrest and constituted justifiable self-defense; (3) that the search of his person was likewise lawful because made as an incident to a lawful arrest; (4) that, therefore, his removal to the

House of Correction Hospital for medical treatment and his booking on a charge of resisting arrest and his immediate release on nominal bail of $50 posted by himself did not constitute wrongful imprisonment; and (5) that it was, therefore, error for the trial court to deny the motion of the defendants for a directed verdict in their favor at the close of all the evidence 42-50

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D. The decision of the Court of Appeals overlooked and failed to apply several well settled yardsticks to the award of punitive damages, namely: (1) they cannot be too disproportionate to the actual damages sustained, (2) they cannot exceed too greatly the criminal penalties specifically provided by law for similar conduct, and (3) they cannot too greatly exceed the financial capacity of the defendants against whom imposed 58-62

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PETITION FOR WRIT OF CERTIORARI.

Your Petitioners, Robert Krause, Lawrence Miller, Thomas J. McManus, Jr., Francis Higgins, and Joseph Goldberg, respectfully pray that a writ of certiorari issue to review the final judgments of the United States Court of Appeals for the Seventh Circuit entered herein against them on December 12, 1952, affirming in part, and reversing in part, without remanding, the judgments entered herein by the District Court (R. 831). A timely Petition for Rehearing was filed on December 26, 1952 (R. 832), and was denied on January 24, 1953 (R. 849). On April 20, 1953, the time for filing the Petition for Writ of Cer-

tiorari was extended, by order of an Associate Justice of this court, to and including June 8, 1953.

The Opinion Below.

The opinion of the Court of Appeals filed herein is included in the Printed Transcript of the Record (R. 813-830), and is officially reported in 200 Fed. (2d) 576.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Preliminary Statement.

Petitioners (defendants below) seek a review by this court of huge judgments entered against them on verdicts returned by a jury in a civil action for damages for alleged unlawful assault and battery and false arrest and imprisonment. The judgments are in the sum of $100,000 against the defendants Krause and Higgins, and $50,000 against the defendants Miller, McManus and Goldberg.

The complaint consisted of two counts. Count 1 charged four of the petitioners, Krause, Higgins, Miller and McManus, (all police officers of the City of Chicago), with unlawful assault and battery, and demanded judgment against each of them in the sum of $50,000 (R. 5-6). Count 2 charged all five petitioners, Krause, Higgins, Miller, McManus and Goldberg (the last named a Captain of Police of the City of Chicago), and also one Frank Sain (Superintendent of the Hospital Section of the House of Correction of the City of Chicago), with false arrest and imprisonment, and demanded judgment against each of them in the sum of $50,000 (R. 6-8). The *ad damnum* in each count was originally $25,000, but was later increased to $50,000

(R. 16-17, 27-28). Frank Sain, although a defendant below, is not a petitioner herein, because the judgment entered against him by the District Court (R. 774-775) was reversed by the Court of Appeals (R. 831).

The answer denied all of the material allegations of the complaint (R. 10, 29), pleaded special facts showing justification and excuse (R. 10-11, 29-31), and further set up the defense of release (R. 11, 31).

The jury returned a verdict for $50,000 against Krause, Higgins, Miller and McManus under Count 1 (R. 690), and a verdict for $65,000 ($15,000 in excess of the *ad damnum*) against Krause, Higgins, Miller, McManus, Goldberg and Sain under Count 2 (R. 691). The plaintiff, on his own initiative, moved for and obtained a $15,000 remittitur of the verdict returned under Count 2 (R. 693, 773-775). Thereupon the District Court entered judgments for $50,000 against Krause, Higgins, Miller and McManus under Count 1, and for $50,000 against Krause, Higgins, Miller, McManus, Goldberg and Sain under Count 2 (R. 774-775).

The Court of Appeals reversed the judgment for $50,000 under Count 1 as to Miller and McManus, but affirmed it as to Krause and Higgins (R. 831), and reversed the judgment for $50,000 under Count 2 as to Frank Sain, but affirmed it as to Krause, Higgins, Miller, McManus and Goldberg (R. 831). As a result of the action taken by the Court of Appeals, the judgments presently outstanding against petitioners are as follows:

Krause:	$100,000	($50,000 under each of Counts 1 and 2.)
Higgins:	$100,000	($50,000 under each of Counts 1 and 2.)
Miller:	$ 50,000	(Under Count 2.)
McManus:	$ 50,000	(Under Count 2.)
Goldberg:	$ 50,000	(Under Count 2.)

The Material Facts.

Plaintiff arrived in Chicago, Illinois, via air from Tulsa, Oklahoma, shortly before midnight, Friday, September 23, 1949 (R. 74-75). After telephoning his fiancee, Ruth Franke, whom he had come to Chicago to marry, he registered at the Astor Hotel, which is located on North Clark Street, between Randolph and Lake Streets, Chicago, Illinois, across the alley to the north from the Sherman Hotel (R. 75-76). After moving his belongings into his hotel room, he went downstairs into the Cloverbar Lounge, which is connected with the Astor Hotel (there being a doorway from the hotel into the lounge), took a seat at the bar, ordered and was served a bottle of beer, and was drinking his beer and listening to the piano (R. 77-78). The piano was playing quite loudly (R. 130). There were a dozen or so people in the bar at the time (R. 129).

We shall now revert to the events leading up to the entry by the police officers Krause and Higgins into the Cloverbar under orders to arrest an armed robber known as "Nick" at the very same time that the plaintiff happened to be there.

Shortly after midnight, at about 12:30 A. M., Saturday, September 24, 1949, a certain Crutale was arrested in a tavern located at 2546 North Clark Street on a complaint that he had held up with a gun and robbed the Pin Up Club, a tavern located at 619 North Clark Street (R. 240-241). Crutale was searched and a .38 caliber revolver found concealed in his trousers under his belt (R. 241). He was brought to the 37th District Police Station (Sheffield Avenue Station) for questioning (R. 329), because the tavern in which he was arrested was located in the 37th Police District. Krause and Miller were police patrolmen of the City of Chicago and assigned to the 37th District

Police station (R. 332). Higgins and McManus were likewise police patrolmen of the City of Chicago and assigned to the 35th District Police Station (R. 334). The Pin Up Club, which Crutale confessed he had robbed, was located in the 35th Police District (R. 334).

All four defendants, Krause, Higgins, Miller and McManus were at the Sheffield Avenue Station and were present when Crutale made his confession (R. 335). Crutale told them that he had obtained the gun found on his person from a friend known as "Nick" (R. 335, 491, 518), whom he had met at the Cloverbar, a tavern located at 172 North Clark Street, and that, just prior to his arrest, he had been talking by telephone to "Nick" and had arranged to meet him at the Cloverbar that night to go out on some robberies together (R. 241). Crutale gave a detailed description of his friend "Nick", namely, that he was 27 to 29 years old, about five feet nine or ten inches in height, about 160 or 165 pounds in weight, of medium build, of fairly light complexion, had brown straight hair, usually wore a gray checked sport jacket, and would be carrying a gun probably underneath his jacket in his belt on the left side (R. 335, 460, 491-492, 518-519).

The four defendants were thereupon ordered by Police Lieutenant Braband, who was then in charge at the Sheffield Avenue Station, to proceed to the Cloverbar and arrest "Nick" (R. 336). Pursuant to that direction, Krause, Higgins, Miller and McManus drove to the vicinity of Clark and Lake Streets, parked the car and proceeded on foot to the Cloverbar (R. 336). In order to avoid possible danger and complications in effecting the arrest, it was arranged among the four of them that Krause and Higgins, because they look least like police officers, would go into the bar (R. 336-337), and that McManus and Miller would wait outside watching points of ingress and egress

(R. 337). All four defendants were in plain clothes at the time. Krause and Higgins accordingly entered the Cloverbar and observed a man sitting at the bar with several vacant seats on each side of him. He was dressed in a gray checked sport jacket (R. 342, 408, 462), his appearance corresponded remarkably with the description of "Nick" as given to them by Crutale (R. 241, 339, 462), and he was the only person in the bar answering the description furnished by Crutale (R. 343).

Krause and Higgins approached this man from either side, and as they came close to him, each seized him by an arm, showed his police star, and announced he was a police officer (R. 241, 341-342, 463). Defendant Krause stated, "I am a police officer. What is your name?" Defendant Higgins said, "I am a police officer. Keep your hands on the bar" (R. 341-342, 462). Krause was on the man's left, and Higgins on his right (R. 341). The man had his hand on a glass of beer when Krause and Higgins announced themselves and seized him (R. 342). He was leaning forward at the time with his hands on the bar (R. 130). Plaintiff testified that after he had taken one drink from his glass, two men seized him, pressed their bodies on both sides of his arms, grabbed his forearms and pressed him forward to the bar (R. 78); that he tried to shove them aside and, while doing so, he reached for his billford with his right arm (R. 78). He said that his billford was in his left hip pocket; that, since his left arm was pinned, he could not use it to get into that pocket, so he tried to get his right hand over there (R. 79); that he tried to get hold of his billford, but before he was able to do so he heard a shot and fell to the floor (R. 79).

Plaintiff testified that he did not hear Krause and Higgins announce themselves as police officers or see their police stars before they seized him (R. 80), but he admitted

that he was leaning forward, with his hands on the bar, and listening to the piano which was near him and playing very loudly (R. 119, 1130). In a written statement signed by plaintiff at 8:30 A. M., that same Saturday, September 24, 1949, plaintiff made the following answers (R. 119):

"Q. Did you see a star or hear anyone announce themselves as police officers?

A. No. The piano was very loud and playing the Hong Kong Blues.

Q. Were you seated near the piano?

A. Yes."

On the trial below, plaintiff testified (R. 130):

"Q. As you were listening to the piano player, you had your hands on the bar; isn't that true?

A. Yes, sir.

* * * * * *

Q. You were leaning forward?

A. Yes, sir.

Q. And you were listening to the piano being played?

A. Yes, sir.

Q. The piano was being played loudly?

A. Yes, sir."

Plaintiff admitted that when he was seized by Krause and Higgins, he reached with his right hand across his waist under his coat toward his left rear pocket where he kept his wallet (R. 130-131); that his first impulse was to get hold of his billfold because he saw that the men who seized him were in plain clothes (R. 130).

Defendant Krause testified that when he and Higgins seized the plaintiff (whom they reasonably believed was "Nick"), he immeditaely withdrew his hand from the glass of beer he was holding, pressed himself against the bar and pushed backwards against the two police officers (R.

342). As he did so, all three men went back against the tavern wall, which was about three or four feet from the place where plaintiff was sitting, and plaintiff doubled up and thrust his right hand down under his coat towards his left pocket (R. 342). Krause was holding plaintiff's left arm and could not see where plaintiff's hand was going, because it was under his coat at the time (R. 342). Plaintiff was wearing a sport coat and it was open (R. 342). The first time that plaintiff reached with his right hand for his left hip pocket, Higgins was still holding plaintiff's right arm, but plaintiff broke Higgins' grasp and made a second reach under his coat for his left hip pocket with his right hand; whereupon Krause, believing that plaintiff was "Nick" and was reaching for his gun which he intended to use in resisting the arrest, and being then and there under the reasonable apprehension that he and Higgins were in grave danger of receiving great bodily harm, fired a shot through his topcoat pocket (R. 342-344, 462-464). The bullet from Krause's gun struck the plaintiff in the buttocks, but went clear through the outer edge of the pelvic bone, fortunately missing the rectum (R. 170).

After the gun went off, there was some scuffling for a few seconds, and then, according to Krause, plaintiff stopped struggling and slid to the floor (R. 344). Higgins testified that he sat plaintiff down on the floor (R. 464). Krause remained standing next to the wall, while Higgins bent over the plaintiff and searched him for a revolver or gun (R. 344, 464-465). Krause testified that after Higgins searched him once, plaintiff made another attempt to reach under his coat, whereupon Krause jumped down and grabbed hold of plaintiff's arm, and then Higgins started searching plaintiff again, and Krause helped him (R. 344-345). They found no gun on plaintiff (R. 345, 465). They did find on his person a wallet containing various cards,

documents, travel tickets and other identification data which indicated that plaintiff was not "Nick" but William G. Bucher of Tulsa, Oklahoma, and that he worked as a mechanic at American Airlines (Plaintiff's Exhibits 5 to 19, R. 700-704).

The written report of this occurrence, which was prepared by defendant Goldberg, as "Captain Commanding 37th District", from information given to him by the four police officers, was offered by plaintiff as his own exhibit, received in evidence as Plaintiff's Exhibit 34 and was read to the jury by plaintiff's counsel (R. 240-242). Said report states the following as to what took place when defendants Krause and Higgins entered the bar to arrest "Nick" (R. 241):

> "Officers Krause and Higgins entered the bar and observed a man sitting alone at the bar who answered the description of the wanted Nick. They approached this man, displaying their stars and announcing they were police officers. With this the man sitting at the bar, since identified as William Bucher, jerked backward and reached under his coat with his right hand. Each of the officers grabbed Bucher by an arm and he broke their grip and again reached under his coat with his hand. A struggle ensued and during the course of the struggle, Officer Krause fired one shot from his service revolver, through his coat pocket, the bullet striking Bucher in the buttock" (R. 241, 719).

These actions of the plaintiff, which were construed by Krause and Higgins as attempts by plaintiff to reach for a gun with which they believed he was armed, were admitted by the plaintiff. He testified that when he was seized, "I tried to push them away (R. 78). He reached his right hand over across his body and under his coat (which was open) in order to try to reach the billfold in his left hip pocket (R. 79, 130-131). He gave as his excuse for making

such lunges with his right hand under his coat toward his left hip pocket that "The first thing that came to my mind was my wallet, as I had been rolled in Chicago twice before" (R. 119). Plaintiff did not deny that his objective conduct, despite the innocence of his secret motive for so acting, was of such a nature as to induce the reasonable belief in Krause and Higgins that he was reaching for a gun instead of a wallet. In this connection, it is of crucial importance that there is no contradiction in the evidence with respect to the nature of plaintiff's objective conduct or of the existence of a reasonable apprehension of serious bodily harm in the minds of Krause and Higgins as a result of plaintiff's actions in resisting his arrest.

Shortly after the shooting, Miller and McManus entered the tavern, and Miller called the police ambulance either at his own or Krause's suggestion (R. 262, 265-269). While plaintiff was waiting for the ambulance, he told the police officers that he had come to Chicago to be married, and that the wedding was scheduled for that Saturday afternoon (R. 87). The ambulance arrived about 20 minutes after the shooting, and plaintiff was placed on a stretcher, carried into the ambulance, and taken to Henrotin Hospital nearby, where he was given first aid and, after remaining there for 20 minutes, he was taken by ambulance to the House of Correction Hospital (R. 80-82). There he was undressed, his wound cleansed, medicated and dressed, and he was given an anti-tetanus shot, clothed in a hospital gown, carried into the hospital ward and placed on a cot (R. 83). He fell asleep about 6:00 or 6:30 that morning (R. 84). The doctor came through the ward about 9:30 in the morning (R. 84). Prior to that, about 8:00 o'clock that morning, Krause and Miller visited plaintiff at the hospital. Plaintiff asked them to explain what he was doing there, and they told him it was an unfortunate thing,

that he should not have reached for his billfold in the manner that he did, that they thought they had the right man, and they were very apologetic to him at the time (R. 84-85). They told plaintiff they were bringing Crutale in to see whether or not he would identify him as his confederate "Nick" (R. 86). Crutale was brought in and he said that plaintiff was not "Nick" (R. 87).

The hospital doctor saw plaintiff again at 9:30 that morning, at which time his wound was redressed and the bed linen changed (R. 88-89). At noon on that same day, plaintiff was told he would be taken out of the hospital (R. 89). About 2:00 P. M., a group of people came in, including defendant Sain, who introduced himself as the Warden of the House of Correction and of the Hospital, and he asked plaintiff how he felt (R. 89). Mr. Sain was apologetic, saying it was unfortunate that this thing had happened, and he introduced plaintiff to a marriage license clerk. Plaintiff was given a marriage license application, which he signed, and he was taken into the receiving room where he was shaved and his wound redressed (R. 89-90). He was given his clothes which had been cleaned, and he put them on (R. 90). Then he was brought over to Sheffield Avenue Station in the patrol wagon (R. 93). Krause and Miller were at the station and told plaintiff to go into a room off the lobby, where Captain Goldberg and two other men were present (R. 94). Goldberg had been granted religious holiday leave from sundown, Friday, September 23rd, to sundown, Sunday, September 25th, 1949 (R. 217). He was at home when someone called him on the telephone at 1:30 P. M. Saturday, and told him that the Commissioner of Police wanted him to come to the station, that a person had been shot early that morning and had been taken to the House of Correction Hospital for treatment, and that he (Goldberg) was needed at the station because

there was no other supervisory officer then available to take care of that matter (R. 217, 223-224). Goldberg arrived at the station at 2:20 P. M., and was briefed by the police officers as to the entire incident. He was informed that plaintiff had been shot because he resisted arrest in such a manner as to induce in Krause the reasonable belief that he was reaching for his gun in order to effect his escape (R. 222-223; See Plaintiff's Exhibit 34, R. 240-242). Goldberg questioned Krause and Miller about the arrest of Crutale the night before, his confession to the robbery of the Pin-Up Club, his statement that at the time of his arrest he had just talked with his confederate "Nick" and was to meet him at the Cloverbar to go out on some robberies with him that night, his detailed description of "Nick" to the police officers, and their trip to the Cloverbar in order to arrest "Nick" who was supposed to be armed. Captain Goldberg was also advised of the entire incident at the Cloverbar which culminated in plaintiff's arrest because of his close resemblance to "Nick", his resistance to the arrest, his being shot as a direct result of such resistance, and his removal to the House of Correction Hospital for treatment (R. 222-225). Thereupon Goldberg, after first ascertaining that plaintiff was in condition to leave the hospital, ordered a patrol wagon to proceed to the hospital and bring plaintiff to the station, which was done (R. 223). When plaintiff arrived at the station, Goldberg spoke to him for only a few minutes, told him that what had happened was unfortunate, and that he was sorry that his wedding plans were all "messed up" (R. 95). Then plaintiff, without any remonstrance on his part, was immediately booked on a charge of resisting arrest, posted a $50 cash bond for his appearance at a hearing of said charge in the Municipal Court of Chicago on the following Monday morning, was given all his belongings

including the rest of his money, and left the station to proceed with his marriage plans (R. 95, 96-97, 98, 99).

The evidence shows that Goldberg had nothing whatever to do with the arrest, shooting or search of the plaintiff, or with his being taken to the House of Correction Hospital for treatment. He did not learn of the incident at all until 1:30 P. M. when he was called at home (where he was on holiday leave) and instructed to come to the station. There, after obtaining detailed information from the police officers, and acting upon such information, all that Goldberg did was to have plaintiff brought from the Hospital to the station, and had him quickly booked and released on nominal bail ($50), so that plaintiff could proceed with his wedding plans without any further delay. [The purpose of bail is to release the arrested person from legal custody and from further detention (*United States* v. *Gordon,* (C. A. 8) 190 Fed. (2d) 16, at p. 19).]

Thus Goldberg did not continue plaintiff's detention but terminated it. For this innocuous conduct, in the line of official duty, Goldberg has been subjected to a verdict and judgment for $50,000 (R. 691, 775), which the Court of Appeals affirmed (R. 831), although expressly recognizing that it consisted in "greater part" of pnitive damages (R. 828).

The evidence also shows that Miller and McManus were likewise not present at the arrest, shooting or search of the plaintiff. They did not enter the tavern until after the shooting, and all that Miller did was to call the ambulance so that plaintiff could be taken to a hospital for medical treatment. As soon as plaintiff was in condition to leave the hospital, he was booked and released. Yet Miller and McManus had verdicts and judgments of $100,000 returned against each of them, not only for the imprisonment (R.

691), but also for the shooting (R. 690) to which they concededly were not parties. [This clear proof of the passion and prejudice of the jury must be held to have permeated all of the verdicts.] The result in the District Court was so shocking that the Court of Appeals reversed the $50,000 judgment against each of them as to the shooting, yet it affirmed the $50,000 judgment against each of them as to the charge of arrest and imprisonment despite the clearly nonculpable character of their conduct. (R. 831).

We shall contend hereinafter that the judgments of $100,000 again Krause and Higgins are likewise shocking and unwarranted, but, certainly, as to Golberg, McManus and Miller, (who were admittedly not present either at the arrest, shooting or search of the plaintiff), the judgments of $50,000 against each of them are unmistakably the result of passion and prejudice, and represent a manifest miscarriage of justice which clamors for rectification by this court.

To proceed further with a recital of the facts: It was about 3:30 P. M. when plaintiff left the station, after having been booked and released on $50 bond posted by himself, and plaintiff was then driven by some newspaper reporters to the Astor Hotel, where he changed into his wedding clothes (R. 99). Then he was driven to the rectory of St. Bonaventure Church, where he was married at about 5:00 P. M. the same Saturday afternoon (R. 100). The wound caused him considerable discomfort, but it did not incapacitate him. On the contrary, he engaged in considerable physical activity immediately after leaving the station after his booking and release. After the ceremony, plaintiff went to the photographer's for wedding pictures, then to his mother-in-law's apartment (where he walked up a flight of stairs) to wait there until proceeding to the wedding supper at

7:00 P. M. that night at a restaurant a long distance away (R. 100). From the wedding supper, plaintiff and the wedding party traveled to his brother-in-law's home where he spent a few hours with all the guests (R. 100-101). Thereafter, plaintiff took his brother's car and drove himself and his bride to her mother's apartment, got her luggage, and then drove to the Sheraton Hotel on Michigan Avenue, Chicago, where he had reserved accommodations (R. 101). That was about 11:30 Saturday night (R. 101). Plaintiff testified that he spent a bad night at the hotel, that the wound pained him, and that his stomach was upset (R. 101). But he did not testify that he did not consummate his marriage that night. Yet, plaintiff's counsel argued to the jury that the defendant police officers "deprived" plaintiff "of his bridal night" (R. 635), which was clearly calculated to and did inflame the jury against the defendants and engender sympathy for the plaintiff.

The next morning, Sunday, 10:00 A. M., plaintiff drove to church, then to a restaurant for breakfast, then to his mother-in-law's apartment for lunch (R. 101-102). That Sunday afternoon, plaintiff drove to Bethany Hospital, on West Van Buren Street, Chicago, quite a long distance away, where he was treated by Dr. Bowman who redressed the wound and put fresh bandages on it, but did not give plaintiff any medication (R. 102). Plaintiff went back to the Sheraton Hotel after leaving the doctor (R. 103). Later, that Sunday, plaintiff drove the car from the hotel to his brother-in-law's place for a visit (R. 146-149).

On Monday morning, plaintiff appeared in court on the charge of resisting arrest (R. 103). Krause and Higgins were there (R. 103-104). The court appointed an attorney to represent plaintiff (R. 361). The City of Chicago was represented by Mr. Barth, an assistant corporation counsel (R. 105). Krause told his story to the court, and then

plaintiff told his version (R. 105-106). Plaintiff again stated that he was shot as he was reaching for his billfold with his right hand toward his left hip pocket (R. 105-106). Before any ruling by the court, plaintiff was told by his lawyer that he had no defense to the charge of resisting arrest and, therefore, had no case against the defendants (R. 106-107). Whereupon a release was drawn up which plaintiff read and executed on his lawyer's assurance that, if he would sign it, the case would be over and he could go home (R. 107-108). Thereafter, the parties went back to the courtroom, the case was called again, Mr. Barth told the judge that a mutual release had been executed, and the court thereupon found the plaintiff not guilty, ordered him discharged and wished him a happy honeymoon (R. 108). The release which plaintiff signed is Plaintiff's Exhibit 20 wherein plaintiff released the City of Chicago and the defendants of all claims arising out of the "arrest, detention and accidental shooting and prosecution of the aforesaid charge and violation, or either of them, and for any suit for damages arising out of the above," in consideration of the consent by the City of Chicago to have the complaint against plaintiff dismissed and to take a non-suit in the case wherein plaintiff was charged with violation of certain city ordinances (R. 123). Plaintiff knew that what he was signing was a release of claim (R. 182-183). The ruling of the court in his favor was not made until after the court was advised that a mutual release had been executed by the parties (R. 183, 363).

Plaintiff remained in Chicago until Friday of that week, on which day he left for Tulsa by train (R. 183-184). He returned to work the following Monday morning, as scheduled, and did not lose a day's work from that time to the day he left Tulsa to come to Chicago for the trial below

(R. 184). He suffered no wage loss at all, and, thereafter, his rate of pay was increased from $1.46 to $1.84 per hour (R. 184-185). He saw a doctor in Tulsa twice within a week after his arrival, the treatment on both occasions consisting merely of changing the dressing (R. 186), and then twice more about 6 months later, in April, 1950, at which time he was treated for his pilonidal cyst (R. 186-187), which was purely a pre-natal condition (R. 181). For these four visits he was billed $12 (R. 185-186). His total bill with Dr. Bowman was $20 (R. 187). He did not see any doctor since April, 1950, until he was examined by a Dr. Shafer on October 6, 1951, who did not treat him but merely examined him for the purpose of testifying for the plaintiff on the trial of this case (R. 196). This uncontradicted evidence refutes the unwarranted and baseless statement of the Court of Appeals that plaintiff "underwent continued treatment for his wounds from the time of his release from Cermak (House of Correction) Hospital to the date of the trial" (R. 816). The damage to his clothing, (treating them as completely ruined, which they were not), was under $40.00 (R. 91-92). In total, his special damages were thus quite nominal.

The medical testimony established that, although plaintiff suffered a painful bullet wound through the outer edge of his pelvic bone, he did not sustain serious injury. There was no evidence of bone infection, and apart from the presence of some metallic fragments in the bone (along the course of the bullet as it entered and went entirely through the outer edge of the bone), it was normal (R. 160). The bullet fortunately missed the rectum (R. 170). The probability of the occurrence of any future bone infection, in view of the absence of any evidence of such an infection when plaintiff was examined shortly before the trial, was purely theoretical (R. 162). Plaintiff had a pilo-

nidal cyst condition which was not attributable to the shooting at all, but was a pre-natal defect in structure (R. 161). A pilonidal cyst can sometimes cause a suppuration which is then called a pilonidal sinus (R. 151), but Dr. Bowman, who examined the plaintiff a few days after the shooting, testified that he did not find any pilonidal sinus condition at that time (R. 166).

Thus, the evidence establishes (a) nominal special damages, (b) a painful but non-serious wound with no bone infection present, (c) no period of incapacity, (d) no loss of wages or earning power, and (e) no permanent ill effects. Moreover, there was no brutal or unkind treatment of plaintiff by any one. He was shown the utmost consideration, and his marriage plans were expedited as much as possible. His stay at the House of Correction Hospital was primarily for purposes of medical treatment, and he was immediately booked and released on nominal bail as soon as his condition warranted his leaving the hospital. His discharge by the court, at the hearing of the complaint of resisting arrest, came *after* he had signed a mutual release of claim (R. 183, 363). Hence, the court's ruling was not necessarily a determination that he had not resisted a lawful arrest. Plaintiff's own unfortunate conduct in reaching under his coat with his right hand for his left hip pocket was the direct cause of placing Krause and Higgins under the reasonable apprehension that plaintiff was reaching for a gun with intent to cause them serious bodily harm in order to escape arrest. There is nothing in the conduct of any of the defendants to establish any illegality, and certainly nothing to suggest any wilful, wanton, reckless or malicious conduct so as to warrant the imposition of any punitive damages which, in view of the smallness of the actual damages and the huge size of the verdicts, form such a major part of the judgments

which we are requesting this court to review. In this connection, we cite this language from the opinion of the Court of Appeals (R. 828):

> "However, it is quite clear, we think, that the greater part of the damages allowed under both counts was punitive."

Where, we sincerely ask, is there any evidence of that "atrocious conduct", of which the Court of Appeals speaks (R. 828), which would justify the imposition of such heavy "monetary punishment" upon any of the defendants, especially upon Miller, McManus and Goldberg, who had nothing whatever to do with the arrest, shooting, or search, and who did nothing thereafter except to attempt to mitigate the consequences to plaintiff arising out of the unfortunate episode?

The Denial of Defendants' Motion for a Mistrial.

The trial of the case opened on Thursday, October 18, 1951 (R. 33-34). The selection of a jury and the opening statements of counsel consumed the morning session (R. 35-72), and the hearing of evidence commenced at 2 o'clock that same afternoon (R. 73). After some of plaintiff's testimony was heard, the trial court excused the jury and certain discussions took place outside the presence and hearing of the jury with respect to the admissibility of various documents that were found upon plaintiff's person when he was searched after he was shot (R. 115). Counsel for defendants contended that these documents were found upon plaintiff's person after the arrest and the shooting and were, therefore, not material to the question of whether the arrest was lawful or the shooting justified (R. 115). Whereupon the trial court excoriated the defendants, and particularly the defendant Joseph Goldberg, terming their conduct "outrageous". The record shows the following (R. 115):

"By the Court: Now, the jury having departed, I think those cards that were in the plaintiff's pocket, his airline ticket, and so forth, were sources of identification which a police officer, in exercising ordinary care, ought to examine and act upon. I think they are material. They may be received.

By Mr. Peters: That was after the shooting and after the arrest.

By the Court: Well, what did they do to this man after the arrest?

By Mr. Peters: They took him to the hospital for treatment.

By the Court: They took him to the hospital, and they kept him, and then had him charged with a misdemeanor.

By Mr. Herr: That's right.

By the Court: Outrageous, I say. Outrageous I say.

By Mr. Herr: Of course, the viewpoints may vary.

By the Court: And after your client had an opportunity that he exercise his discretion with respect to the matter.

By Mr. Herr: Your Honor, my client acts upon reports he gets from his subordinate officers.

By the Court: He was there and had an opportunity to exercise his discretion in the matter, and he was the supervisory functionary. I think they are all admissible. They may be received."

Counsel for the defendants then suggested that the trial court consider the fact that Captain Goldberg acted upon information given to him by subordinates who were also police officers (R. 116), and then the following colloquy occurred between counsel for defendants and the trial court (R. 116-117):

"By Mr. Herr: And his duty, when he is given information by a subordinate, holding a like public office.

By the Court: That may be.

By Mr. Herr: I wish your Honor wouldn't foreclose me on that.

By the Court: I am not going to foreclose you, but still I would expect a man of the grade of captain, if he operated on a proposition of this kind, to operate somewhat differently than in this manner. Your client.

By Mr. Herr: Well, when matters of judgment are being called upon to be judged—

By the Court: Well, it isn't the first time.

By Mr. Herr: Questions do occur as to whether two people would act alike, and maybe it was the best that the matter be submitted to a court for consideration. They didn't hold him after that charge. When it was brought to the Captain's attention, he acted with haste."

In the evening papers of wide and general circulation in Chicago, an item appeared on October 19, 1951, a Friday, and items also appeared in the morning papers of October 20, 1951, a Saturday. One of these articles bore the following headline (R. 21; Exhibit "A"):

"UNITED STATES JUDGE RAPS POLICE CAPTAIN."

Directly beneath said headline appeared the following (R. 21):

"Federal Judge John P. Barnes angrily criticised Police Capt. Joseph Goldberg Friday for his handling of a case in which a man was mistakenly shot by police.

The Judge said it was 'outrageous'." * * *

At that point, Judge Barnes ordered the jury out of the courtroom and exclaimed:

"I think it's outrageous. They had his identification cards. That should mean something to a police officer normally.

I would expect a man of the grade of captain to act differently." * * *

In another newspaper was printed the following headline and sub-title (R. 22-23; Exhibit "B"):

"CHARGES DURESS IN COURT AFTER COPS SHOT HIM

Innocent Man Tells of Signing Release."

This is the most innocuous of the headlines, but in the body of this article appears the following recital (R. 23):

> "At one point in the trial, Judge Barnes excused the jury briefly and said he thought the handling of the case by the police was 'outrageous.'
>
> "'This man's identification should have meant something to any police officer, particularly one in a supervisory capacity such as a police captain,' the judge said."

In still another newspaper appeared an article containing this headline (R. 23; Exhibit "C"):

"POLICE CAPTAIN REPRIMANDED IN SHOOTING."

The first paragraph of the article was as follows (R. 23):

> "Police Capt. Joseph Goldberg was rebuked sharply in U. S. District Court Friday for his handling of a mistaken-identity shooting by a squad under his command in 1949."

The final paragraph of the article read as follows (R. 23):

> "'The handling of this incident was outrageous,' U. S. District Judge John P. Barnes commented. 'I would expect a man in the position of a police captain to behave differently.'"

The trial was adjourned on Friday, October 19, 1951, until the following Monday, October 22nd, so that there was an entire week-end during which the jurors were subject to the possible publicity of these articles (R. 226).

At the trial session Monday morning, October 22nd, the defendants presented their motion, supported by affidavit, for a mistrial because of the prejudicial remarks of the trial judge as reported in the Chicago newspapers and which, if brought to the attention of the jurors, were calculated to inflame them and prevent the defendants from obtaining a fair trial (R. 19-21).

The affidavit accompanying the motion stated, *first,* that the jurors may have read the articles and the defendants would be greatly prejudiced thereby, and *second,* that even though they may not yet have read the articles, they might thereafter read them or have their attention called to them during the further progress of the trial at the time when the defendants would be without right to inquire into the subject (R. 20).

On consideration of the motion, after discussion between court and counsel, the trial court questioned each of the jurors, putting to each of them this question (R. 232):

> "Have you read any of the articles which appeared in the Chicago Tribune, the Chicago Daily News and the Chicago Sun-Times on last Friday and Saturday and relating to the trial of this case?"

Three of the jurors answered that they had read the headlines. One juror's answer was as follows (R. 232):

> "On Friday I read just the headline, no article."

Another juror answered (R. 233): "Just the headline, Judge."

A third juror answered (R. 233): "Just the headline, sir."

Nevertheless, the trial court denied the defendants' motion to withdraw a juror and continue the case (R. 23, 236-237).

It is important to point out that the trial judge was of the opinion that the three jurors, who stated that they had

read the headlines, knew that the published articles referred to the case before them. The trial court said (R. 234):

> "Oh, I think they knew there was an article there relating to—those three persons knew it was an article relating to the case."

The trial judge then suggested that the three jurors who had admitted reading the headlines should be excused from further hearing of the case, and that the trial should proceed before the remaining nine jurors (R. 236). The defendants did not agree to this procedure, but insisted upon the ordering of a mistrial (R. 235-236). The trial court, however, ordered the case to go forward before the entire panel of 12, including the 3 jurors who had admitted reading the headlines (R. 236-237).

In this connection, the following interesting colloquy took place between court and counsel (R. 235):

> "By the Court: Are you gentlemen willing to try the case with those three jurors eliminated?
>
> By Mr. Herr: No, sir.
>
> By the Court: Well, I guess what you really want is a continuance or error in the record.
>
> By Mr. Cashen: It is for the Circuit Court of Appeals, and I am not worried about the Circuit Court of Appeals if we get a verdict in this case."

The Court of Appeals, in disposing of the defendants' contention that the trial court's denial of the motion for a mistrial precluded the defendants from obtaining a fair trial at the hands of the jury, pointed out that each of the three jurors who admitted reading the headlines answered in the singular, that is, each one admitted merely reading "the headline" (R. 822, 823). Therefore, said the Court of Appeals, since only two of the three headlines mentioned the trial judge's rebuke of the defendants' conduct, it was possible that all three of the jurors read the innocuous

headline and did not read either of the other two prejudicial headlines (R. 823). The Court of Appeals attached no weight to the great probability that the jurors may have read one of the prejudicial headlines, and resolved the doubt against the defendants instead of making sure that no prejudice actually did result before approving of the trial court's action in denying the motion for a mistrial. Said the Court of Appeals (R. 823):

> "Three jurors admitted that they had read a headline. But we do not know which one; whether it was one which indicated that the court had reprimanded Goldberg, or one which stated: 'Charges Duress in Court After Police Shot Him.'"

The Court of Appeals also made much of the circumstance that the prejudicial remarks came to the attention of the three jurors not directly from the trial court itself but through the medium of newspaper articles purporting to quote what the trial judge had said (R. 823). However, these newspaper headlines derived their overwhelming prejudicial impact upon the jury from the fact that they were truthfully publicized as constituting intemperate remarks emanating from the trial judge. Jurors who read the headlines were truthfully informed of the trial court's expressed reaction to the conduct attributed to the defendants. The newspaper headlines had the same effect upon the jury as if the trial court had made these statements to the jury directly.

The Denial of Defendants' Motion for a Directed Verdict.

The trial court denied the motion of the defendants for a directed verdict in their favor at the close of plaintiff's case (R. 24-26), and again at the close of all of the evidence (R. 749-751). These motions were necessarily based upon at least two grounds: (1) that there was probable cause for

the arrest, and (2) plaintiff had executed a release of all claims. On the issue of probable cause, the evidence established, as a matter of law, (a) that the defendants Krause and Higgins had reasonable grounds, under the particular facts and circumstances of the case, for believing that plaintiff was the armed robber known as "Nick," and (b) that plaintiff's conduct in resisting arrest was sufficient to induce in the defendants Krause and Higgins the reasonable belief, under the particular facts and circumstances of the case, that plaintiff was attempting to reach for a gun, which they reasonably believed he was carrying, and that they were in imminent peril of death or serious injury. The proof of the facts and circumstances forming the basis for such a reasonable belief in the minds of defendants Krause and Higgins was uncontradicted, both with respect to the information upon which they acted as well as with respect to the nature of plaintiff's conduct in resisting the arrest. There being no conflict in the evidence on this aspect of the case, the question whether there existed probable cause for the arrest was one of law for the court to decide (*People* v. *Kissane,* 347 Ill. 385, 389; 179 N. E. 850), and the only proper conclusion for the trial court to have reached, in the light of the facts and circumstances in evidence, was that the arrest was lawful.

The Court of Appeals adopted an erroneous view of the evidence bearing on the issue of probable cause by assuming that it was controverted (R. 818), when it clearly was not. The legal sufficiency of the evidence to constitute probable cause is manifest, inasmuch as it fully satisfies the test of probable cause laid down by this court in *Brinegar* v. *United States,* 338 U. S. 160, 175-176; 93 L. Ed. 1879, 1890; in which case this court also declared that it is not bound by the trial judge's conclusion that the facts are sufficient or insufficient to constitute probable cause, but

will determine that question for itself on the basis of the evidence in the record.

If the arrest was lawful as having been made on probable cause, plaintiff's resistance thereto was unlawful, his wounding and shooting was in justifiable self-defense, and his subsequent detention, booking and release on nominal bail were likewise not wrongful. Consequently, the trial court should have directed a verdict for the defendants at the close of all the evidence.

On the issue of the release, the evidence established without contradiction that plaintiff executed a release of all claims arising out of the arrest, assault, wounding and detention, and that he read and understood the release before he signed it (R. 182-183, 704-705). The stated consideration for the release was the dismissal of the complaint against plaintiff for resisting a police officer who was making a lawful arrest (R. 704-705). The trial court refused to give this release any legal effect on the asserted grounds that (1) it was executed under duress of imprisonment, and (2) there was a failure of consideration, both of which conclusions were erroneous but were upheld by the Court of Appeals (R. 824-825). The evidence shows beyond any doubt that plaintiff had been freed on nominal bond, and was not in legal custody or under duress of imprisonment when he signed the release. His motive in signing the release was obviously to be free of the charge against him for resisting arrest, but he was not under coercion or duress of imprisonment when he signed it. With respect to the claimed failure of consideration for the release, the Court of Appeals took the position that plaintiff did not receive the promised consideration because he was found not guilty instead of having the case dismissed (R. 825). What the Court of Appeals overlooked, however, is that the Municipal Court which heard the charge against plain-

tiff did not make its finding of not guilty until *after* it had been advised that a mutual release had been executed by the parties (R. 183, 363). It is manifest, therefore, from the uncontradicted evidence that plaintiff obtained the benefit of his bargain, and it was error for the trial court to have refused to give conclusive legal effect to the mutual release. Had this been done, the trial court would have had to direct a verdict in favor of the defendants at the close of all the evidence.

The Instruction on Punitive Damages.

The trial court instructed the jury that if they found from the evidence that plaintiff was entitled to compensatory damages, they could add an additional sum as smart money or punishment if they further found from the evidence that the acts complained of were done wilfully or intentionally or with some element of aggravation (R. 595-596, 762). This instruction was objected to by the defendants on the specific ground that there was no evidence to support such an instruction (R. 595-596). This instruction was reversibly erroneous on several fundamental grounds: (1) The evidence showed, as a matter of law, that the arrest was on probable cause, and that the conduct of the defendants was in all respects lawful. (2) There is no evidence that the defendants acted either wilfully, wantonly, maliciously,or recklessly, even if it be assumed that their conduct was in some respects unlawful. (3) Some of the defendants (Miller, McManus and Goldberg) did not participate at all in the arrest, shooting, wounding or searching of the plaintiff, and the rule is that in an action for damages jointly against multiple defendants, an award of punitive damages cannot properly be made at all, if any one of them is not guilty of such conduct as would warrant the imposition of punitive damages. Yet the verdict and judgment

under Count I, which was based on the shooting, was in the huge sum of $50,000 against Krause, Higgins, Miller and McManus, without differentiation, although Miller and McManus did not participate in the arrest, shooting, wounding or searching of the plaintiff. The verdict (as reduced) and judgment under Count II was likewise in the huge sum of $50,000 against Krause, Higgins, Miller, McManus and Goldberg (and also even against Sain), although Goldberg did not participate in the arrest, shooting, wounding or searching of the plaintiff, or in sending him to the hospital and keeping him there overnight, and in fact did nothing except have the plaintiff immediately booked and released on nominal bail, which, as already pointed out above, constituted a termination of plaintiff's detention instead of a prolongation thereof (*United States* v. *Gordon*, (C.A. 8) 190 Fed. (2d) 16, 19).

The Court of Appeals not only approvel of the trial court's erroneous conduct in giving the aforementioned instruction on punitive damages to the jury, but committed a further serious error when it reversed the judgment under Count I as to defendants Miller and McManus, and reversed the judgment under Count II as to defendant Sain, without reversing the judgments under both counts as to all of the defendants. In permitting the judgments under Counts I and II to stand against less than all of the defendants against whom the verdicts were originally rendered, the Court of Appeals refused to follow the well settled rule that verdicts against multiple defendants which include punitive damages in large measure must be reversed as to all of the defendants if they are reversed as to some of them. The District Court and Court of Appeals also failed to apply (and in fact condoned the violation of) several well settled principles by which the propriety of an award of punitive damages must be tested, namely, (1)

that punitive damages cannot be too disproportionate to the actual damages sustained, (2) that they cannot exceed too greatly the criminal penalties specifically provided by law for the conduct involved, and (3) that they cannot be out of all proportion to the financial capacity of the defendant against whom imposed.

The District Court committed numerous other serious errors on the trial of the cause, among them the following: (1) permitting incompetent, irrelevant and immaterial evidence to be received over the objections of the defendants, (2) submitting to the jury erroneous instructions tendered by palintiff and objected to by the defendants, (3) refusing to submit to the jury correct instructions tendered by the defendants, (4) instructing the jury in such a manner as to exaggerate matters favorable to the plaintiff and minimizing or entirely ignoring those favorable to the defendants, (5) denying the motion of the defendants for a medical examination of the plaintiff during a convenient week-end recess a day or two after the trial had commenced, although the plaintiff (a non-resident) had refused to submit to such an examination before trial, (6) refusing to grant the motion of the defendants for a new trial upon all of the errors already urged above, and the additional grounds that (a) the verdict was so outrageously excessive that it would be an abuse of judicial discretion to refuse to grant a new trial on that ground, and (b) that the verdict was clearly the result of the passion and prejudice of the jury. None of these numerous errors was rectified by the Court of Appeals, but, on the contrary, all of them were sanctioned and confirmed by its opinion herein (R. 813-830). These erroneous rulings by the trial court, and their erroneous confirmation by the Court of Appeals, will be dealt with more specifically hereinafter.

JURISDICTIONAL STATEMENT.

Subparagraph (1) of Section 1254, Title 28, United States Code, confers jurisdiction upon the Supreme Court of the United States to review cases (civil or criminal) in the United States Courts of Appeals by writ of certiorari granted upon the petition of any party to any such case, before or after rendition of judgment or decree (28 U. S. C. 1254 (1).) In the case at bar, the certiorari jurisdiction of this court is being invoked to review judgments against the petitioners herein entered by the United States Court of Appeals for the Seventh Circuit on December 12, 1953 (R. 831). These judgments did not become final for purposes of review by this court until the denial of a timely Petition for Rehearing on January 24, 1953 (R. 849).

In *Citizens Bank of Michigan City, Indiana* v. *Opperman*, 249 U. S. 448, this court said (p. 450):

> "When a petition for rehearing is entertained the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of and the three months' limitation begins to run from date of such denial or other disposition."

See, also: *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498, 499; *Dept. of Banking, State of Nebraska* v. *Pink*, 317 U. S. 264.

Subparagraph (c) of Section 2101, Title 28, United States Code, provides that a writ of certiorari to bring any judgment before this court for review must be applied for within ninety days after the entry of such judgment, unless the time for such application be extended by a Justice of this court for a period not exceeding sixty days (28 U. S. C. 2101 (c).)

On April 20, 1953, this court, (by an Associate Justice thereof), granted an enlargement of time to and including June 8, 1953, for the filing of a petition for writ of certiorari in this cause.

QUESTIONS PRESENTED.

1. When police officers are informed by a confessed robber, who has just been arrested and upon whom a gun has been found, that he was on his way to meet an accomplice (from whom he had obtained the gun found on his person) at a particular tavern for the purpose of going out on some robberies with him, and the confessed robber at the same time furnishes the police officers with a detailed description of his accomplice who, he also tells them, usually carries a gun concealed under his coat, and the police officers, in the performance of their legal duties, thereupon proceed to the said tavern and, from among the ten or twelve patrons there, place under arrest the only person whose appearance and dress tallies with the detailed description given by the confessed robber of his confederate, is such an arrest made upon probable cause?

2. When police officers have been advised by a confessed robber that his accomplice would probably be carrying a gun concealed under his coat, are they justified, when they approach the accomplice for the purpose of placing him under arrest, in seizing him before he has an opportunity to use his gun in resisting the arrest?

3. When police officers place a person under arrest, and he offers violent resistance to such arrest and twice reaches under his coat for what the police officers reasonably believe is a gun which they have been informed by his accomplice (a confessed robber) he is carrying concealed under his coat, as a result of which the police officers are placed under the reasonable apprehension that they are in imminent danger of serious bodily harm, does not the shooting of the arrested person by one of the police officers constitute justifiable self-defense?

4. In determining whether an arrest by police officers without a warrant was made upon probable cause, must all the facts and circumstances upon which the police officers acted be within their own knowledge, or are they entitled also to act upon information supplied to them by third parties?

5. When police officers act upon information which induces in them the reasonable belief that they are arresting a dangerous criminal who is carrying a concealed gun under his coat, is the question of probable cause for the arrest to be determined by the facts as they actually are or as the police officers reasonably believe them to be at the time of making the arrest?

6. Does the fact that the person whom the police officers have arrested under the reasonable belief that he is a dangerous criminal armed with a concealed weapon turns out to be an innocent and unarmed individual preclude the defense that the arrest was made upon probable cause?

7. When the facts and circumstances in evidence which are relied upon as constituting probable cause for the arrest are uncontradicted, does not the question of the sufficiency of such evidence to constitute probable cause for the arrest become one of law for the trial court to decide, and is it not error for the trial court to submit such question to the jury?

8. Where police officers are acting upon adequate probable cause in making an arrest without a warrant, does the actual innocence of the person arrested entitle him to resist the arrest in such a violent manner as to induce in the minds of the arresting officers the reasonable belief that they are in imminent danger of great bodily harm from such resistance?

9. Is not the person offering such violent resistance guilty of the crime of resisting a lawful arrest, notwith-

standing that he is otherwise actually innocent of any wrongdoing?

10. When an arrest by police officers without a warrant of an innocent person is lawful because made upon probable cause, and the person arrested offers violent resistance thereto, does such resistance become lawful because of the actual innocence of the person arrested, or does it remain unlawful because the arrest was made upon probable cause although under an honest mistake of identity?

11. When an arrest is lawful because made upon probable cause, and the arrested person is injured as a direct result of his violent and unlawful resistance thereto, does his placement in the hospital section of a correctional institutioin for medical treatment, and his detention there until physically able to be booked on a charge of resisting arrest and immediately released on nominal bail, constitute wrongful imprisonment?

12. Did not the booking of the plaintiff on a charge of resisting arrest, and his immediate release on a nominal cash bond of $50 posted by himself, result in a termination of his detention rather than a prolongation thereof?

13. Was the Court of Appeals warranted in affirming judgments aggregating $100,000 against each of the police officers Krause and Higgins in the face of the uncontradicted evidence that they arrested plaintiff under the reasonable belief that he was a dangerous criminal armed with a concealed firearm, that plaintiff's resistance to the arrest was violent and of such a nature as to induce in Krause and Higgins the reasonable apprehension that he was reaching for his gun, and that they were in imminent peril of serious bodily harm, that plaintiff was shot in justifiable self-defense, and that after plaintiff's true identity was ascertained by a search of his person all that

occurred was that plaintiff was taken to the House of Correction Hospital for medical treatment and then, after his physical condition permitted him to be removed from the hospital, was booked on a charge of resisting arrest and immediately released on nominal bail?

14. Was the Court of Appeals justified in affirming judgments for $50,000 against police officers Miller and McManus in the face of the uncontradicted evidence that neither of them participated either in the arrest, shooting or searching of the plaintiff, and that all that occurred thereafter was that plaintiff was taken (not by them) to the House of Correctiion Hospital for medical treatment and then, after his physical condition permitted him to leave the hospital, was booked on a charge of resisting arrest and immediately released on nominal bail?

15. Was the Court of Appeals warranted in affirming a judgment for $50,000 against Police Captain Goldberg in the face of the uncontradicted evidence that he did not participate either in the arrest, shooting or searching of the plaintiff, or in having plaintiff detained at the House of Correction Hospital, and did nothing more than (a) interrupt his official holiday leave on the direct order of the Commissioner of Police, (b) proceed from his home to the police station which he commanded, (c) receive a full report of the incident from the police officers who made the arrest and, (d) based upon such report, (which included the specification that plaintiff violently resisted a lawful arrest), order the plaintiff to be brought to the station after ascertaining that he was in condition to leave the hospital, and (e) cause the plaintiff to be booked on a charge of resisting arrest and immediately released on a nominal cash bond of $50 posted by the plaintiff himself?

16. When prejudicial remarks of the trial court, although made outside of the presence and hearing of the

jury, come to the attention of some of the jurors by reason of widespread newspaper publicity given to such remarks during the course of the trial, should not the trial court order a mistrial at the timely request of the parties to the cause against whom the prejudicial remarks of the court were directed, in order to assure such parties of a fair and impartial trial?

17. Did not the prejudicial remarks of the trial judge, characterizing the conduct of the defendants, and especially of Captain Goldberg, as "outrageous", which remarks came to the attention of some of the jurors through the medium of widespread newspaper publicity during the course of the trial, deprive the defendants of a fair and impartial hearing which is an essential ingredient of due process of law?

18. When of the three newspaper headlines referring to the remarks of the trial judge, two were prejudicial to the defendants and one was innocuous, and three of the jurors admitted that they had read the "headline", was it fair to the defendants for the Court of Appeals to hold that the trial judge properly denied their motion for a mistrial on the arbitrary assumption that all of said jurors might have read the innocuous headline rather than either of the two prejudicial ones.

19. Did not the Court of Appeals commit serious error in affirming judgments against the defendants which admittedly consisted of punitive damages in "greater part", in view of the uncontradicted evidence that none of the defendants was guilty of any wrongful, much less of any willful, wanton, reckless or malicious, conduct toward the plaintiff?

20. Even assuming that plaintiff's arrest by Krause and Higgins was for some reason unlawful, and even willful

and wanton which it clearly was not, was it not improper to award punitive damages against either Miller, McManus or Goldberg, in view of the uncontradicted evidence that neither of them either directed or participated in the arrest, shooting or searching of plaintiff, or that they acted wrongfully, much less willfully, wantonly, recklessly or maliciously, toward the plaintiff.

21. In an action for damages jointly against multiple defendants, is it not improper to make an award of punitive damages against any one of them, unless all of them are guilty of such conduct as would warrant the imposition of such damages?

22. Is it not the true rule that in a suit for damages jointly against multiple defendants, not all of whom are equally culpable, an award of punitive damages cannot properly be made against all of them in a joint verdict or judgment?

23. In view of the foregoing rule, was it not error for the trial court to instruct the jury that they could include punitive damages in joint verdicts against multiple defendants of unequal culpability, and for the Court of Appeals to affirm judgments entered upon such joint verdicts which consisted largely of punitive damages?

24. When judgments entered against multiple defendants, and consisting largely of punitive damages, are reversed on appeal as to some of the defendants, must they not be also be reversed as to the remaining defendants and a new trial granted where, as here, it cannot fairly or reasonably be assumed that the jury would have returned verdicts in similar amounts against a lesser number of defendants?

25. Since the verdicts and judgments embody punitive damages in a major but undetermined amount, did not the

reversal of the judgments by the Court of Appeals as to some of the defendants result in great prejudice to those defendants (less than all) as to whom the judgments were affirmed?

26. In the light of the evidence, were not the verdicts so outrageously excessive as against each and every one of the defendants, that the trial court's refusal to set them aside, as well as the Court of Appeal's affirmance of the judgments entered on such verdicts, represent a clear case of abuse of judicial discretion?

27. Are not the verdicts, in so far as judgments entered upon them have been affirmed by the Court of Appeals, so disproportionately large, when viewed in the light of the small amount of actual damages proved and the lack of either factual or legal basis for an award of punitive damges, as to clearly warrant the conclusion that they are based upon the passion and prejudice of the jury?

28. Is not the conclusion that the verdicts of the jury were based upon passion and prejudice strengthened by the circumstance that the prejudicial remarks of the trial judge, characterizing the conduct of the defendants as "outrageous", came to the attention of some of the jurors during the early stage of the trial, and might have come to the attention of additional jurors subsequent to the denial of the defendants' motion for a mistrial?

29. Did not the huge verdicts rendered against the defendants violate the following well-settled principles governing punitive damages, namely (a) that they cannot be too disproportionately huge when compared to the actual damages sustained; (b) that they cannot exceed too greatly the criminal penalties prescribed for similar conduct; and (3) that they cannot be too disproportionate to the proved financial capacity of the defendants against whom they are imposed?

30. Should not the Court of Appeals have decided whether the jury's verdict was within the bounds of "tolerable conclusion" without reference to the trial court's determination of the same question, particularly in view of the trial court's nonjudicious and explosive declaration that the conduct of the defendants was "outrageous"?

31. In view of the trial court's expressed unfavorable attitude toward the conduct of the defendants, was it not error for the Court of Appeals to hold that "to reverse the judgment we must conclude that the trial court has abused its discretion in failing to conclude that the jury abused its discretion in returning a verdict of the magnitude of the one here involved"?

32. Does not the evidence establish beyond contradiction that the plaintiff, upon the advice of his attorney who was appointed by the court which heard the charge of resisting arrest, executed a release of all claims arising out of his arrest, shooting and detention, in consideration of having the charge of resisting arrest dismissed?

33. Does the fact that the judge hearing the charge of resisting arrest found the plaintiff not guilty instead of dismissing the case justify the conclusion of the District Court (affirmed by the Court of Appeals) that the consideration for the release had failed, in view of the uncontradicted evidence that the judge did not find the defendant not guilty until after he had been advised that a mutual release of claim had been executed by the plaintiff?

34. Did not the District Court commit prejudicial error by permitting the reception in evidence, over the objection of the defendants, certain correspondence between the plaintiff and the attorney who represented the City of Chicago at the hearing of the charge of resisting arrest wherein the plaintiff requested nominal compensation for

his injuries and the attorney for the city informally suggested that a purse of $100 would be collected for that purpose, thus making it appear that there was an admission of liability by the defendants or on their behalf, when as a matter of uncontradicted fact said attorney did not represent any of the defendants in any respect whatsoever and the contents of the letters were not communicated to any of the defendants?

35. Was it not extremely prejudicial to the defendants for the trial court to have permitted the reception in evidence, without limitation, of the numerous papers (fifteen in number) found on plaintiff's person, (after the arrest, the shooting and searching of the plaintiff had already taken place), which showed that plaintiff was an innocent person and not the dangerous armed criminal that the police officers reasonably believed him to be at the time of the arrest and the shooting, notwithstanding the specific objection of the defendants that they were not relevant to the question of the legality of the arrest or the justification for the shooting and searching of the plaintiff?

36. Inasmuch as the defendants conceded that this was a case of mistaken identity, thus removing that issue from the realm of controverted fact, did not the reception in evidence of the fifteen identification documents so unduly accentuate the issue of the plaintiff's true identity as to result in extreme prejudice to the defendants and deprive them of a fair and impartial trial?

37. Did not the trial court err in a most serious particular when it denied the motion of the defendants for a medical examination of the plaintiff, (under Rule 35 of the Federal Rules of Federal Procedure), which request was made on the day following the commencement of the trial and shortly before the trial was adjourned for the

week-end, especially since the plaintiff, who resided at Tulsa, Oklahoma, (which is over 700 miles from Chicago, Illinois), refused to submit to an earlier medical examination on the ground that it was inconvenient for him to come to Chicago to do so?

38. Did not counsel for plaintiff, in their arguments to the jury, so inflame the jurors by their vicious attack upon the Chicago police force in general, that the defendants were made the victims of the jury's passion and prejudice and so were deprived of a fair and impartial trial?

39. Are not the verdicts and the judgments entered thereon so outrageously excessive as to require their reversal on the ground that their approval by the trial court and the Court of Appeals constitutes an abuse of judicial discretion?

40. Are not the verdicts so clearly monstrous as to establish beyond doubt that they are the result of the passion and prejudice of the jury?

41. Should not the decision of the Court of Appeals be reversed, and the cause remanded for a new trial, in order that the defendants as well as the plaintiff may have a fair and impartial hearing of the issues involved free from the serious errors of law committed and the passion and prejudice engendered upon the first trial of the cause?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The decision of the United States Court of Appeals for the Seventh Circuit, affirming the judgments of the District Court as to certain of the defendants (the petitioners herein), is contrary to numerous well settled principles of law and not in accord with the applicable decisions of this court, and, on issues as to which local law controls, is contrary to the applicable decisions of the highest court of the State of Illinois.

A.

The uncontradicted evidence establishes that the conduct of the defendants was in every respect lawful, namely: (1) that plaintiff's arrest was made upon adequate probable cause; (2) that his shooting and wounding was a direct result of his violent resistance to a lawful arrest and constituted justifiable self-defense; (3) that the search of his person was likewise lawful because made as an incident to a lawful arrest; (4) that, therefore, his removal to the House of Correction Hospital for medical treatment and his booking on a charge of resisting arrest and his immediate release on nominal bail of $50 posted by himself did not constitute wrongful imprisonment; and (5) that it was, therefore, error for the trial court to deny the motion of the defendants for a directed verdict in their favor at the close of all the evidence.

The evidence shows without contradiction that defendants Krause and Higgins had reasonable grounds for believing that plaintiff was the armed robber, "Nick," who

was waiting to meet Crutale at the Cloverbar to go out on some robberies with him. Plaintiff's remarkably close resemblance to "Nick" both in personal appearance and dress, and his presence at the Cloverbar where Crutale said he would be, furnished an adequate basis for this reasonable belief and rendered plaintiff's arrest lawful despite the honest mistake as to his true identity. Crutale's information that "Nick" usually carried a gun concealed under his coat likewise constituted adequate ground for the reasonable belief that plaintiff was reaching for a gun when he twice thrust his hand under his coat during his resistance to the arrest. Plaintiff was the only person of the dozen or more patrons present at the Cloverbar at that time whose appearance and dress tallied with the description of "Nick" as given by Crutale. All of the foregoing facts stand uncontradicted on this record, and, in these circumstances, the law is clear that the arrest of the plaintiff was lawful as having been made upon adequate probable cause.

In *Brinegar* v. *United States*, 338 U. S. 160, 175; 93 L. Ed. 1879, 1890, this court stated:

> "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief in guilt.' * * * And this 'means less than evidence which would justify condemnation or conviction' * * *."

Inasmuch as the facts on which the defendants based their reasonable belief stand uncontradicted, the only question was whether these facts were sufficient to induce such a reasonable belief. This was a question of law for the court to decide (*People* v. *Kissane*, 347 Ill. 385, 389; 179 N. E. 850; *People* v. *Davies*, 354 Ill. 168, 176; 188 N. E. 337.) Yet the trial court did not pass upon the question itself, but submitted it to the jury.

On the issue of probable cause, as well as upon the issue of self-defense, the trial court laid controlling emphasis on

the fact that plaintiff was actually an innocent person and not the armed robber "Nick" whom the police officers reasonably believed him to be, and also that plaintiff was actually unarmed and was reaching for his wallet instead of for a gun. Yet it is well settled that the issue of self-defense must be determined not by whether defendants Krause and Higgins were actually in danger, but whether they reasonably believed that they were in imminent danger of serious bodily harm, and, further, it is not what *any* reasonable man would have done under the same circumstances, but what the particular defendants (Krause and Higgins) could reasonably be expected to do under the particular circumstances and in view of what they reasonably believed to be the danger confronting them (*People* v. *Duncan,* 315 Ill. 106, 111, 112; 145 N. E. 810).

The trial court refused an instruction tendered by defendants which told the jury "that the defendant Robert Krause was the best judge of what was necessary to defend himself against the attack or the apparent attack and of the means to be used for his own protection" (R. 610-611, 766).

Instead, the court instructed the jury that "The test is would a reasonable person under like circumstances have believed himself to be in danger of receiving great bodily harm" (R. 764). This instruction applied a test of self-defense condemned as erroneous in *People* v. *Duncan,* 315 Ill. 106, 112; 145 N. E. 810, because it completely omitted the element of what defendant Krause (not any other person) reasonably believed to be the extent of the peril which confronted him at the time he discharged his revolver.

The law is also well settled that identification information received from an outside source may constitute sufficient basis for justifying an arrest on the ground of the existence of a reasonable ground for believing that the person an-

swering the description is guilty of having committed a crime, although he is in fact innocent.

In *People* v. *Euctice,* 371 Ill. 159, 161-162; 20 N. E. (2d) 83, an arrest by a police officer without a warrant was upheld as legal, where the person arrested answered the description of a man who had committed a robbery as given in a police radio call, although the person arrested was entirely innocent.

In *People* v. *Filas,* 369 Ill. 78, 83; 15 N. E. (2d) 718, an arrest without a warrant by a police officer based purely upon information as to identity was held lawful. The correspondence in appearance between the person arrested and the actual perpetrator of the crime was considered sufficient to induce a reasonable belief in the mind of the arresting officer that he was arresting the correct person. The fact that the crime was committed on March 17, 1936, the information as to defendant's identity given to the arresting officer almost two weeks later, namely, on March 30, 1936, and the arrest made on March 31, 1936, was held not to affect the legality of the arrest.

In *Montgomery* v. *Harms,* 349 Ill. App. 245 (decided January 19, 1953), the Appellate Court of Illinois for the Third District, in a malicious prosecution action involving a case of mistaken identity, declared (p. 251):

> "The plaintiff contends that the defendant is guilty of malicious prosecution. It would be a harsh rule that would hold a citizen guilty of malicious prosecution in causing the arrest and imprisonment of a person simply on the basis of mistaken identification, when there is no other evidence on which to base it. If such were the rule, the plaintiff would be entitled to punitive damages, even though the defendant had acted in the best of faith as a good and law-abiding citizen. Such a rule would deter the prosecution in all criminal cases to such an extent that it would be almost impossible to have a witness identify a criminal suspect for fear

that he might be in error and be liable for punitive or exemplary damages."

In *People* v. *Roberta,* 352 Ill. 189, 185 N. E. 253, the court held that an arrest by a police officer, upon identification information supplied by another, was lawful where the police officer has reasonable grounds for believing that the person arrested was "implicated in a crime." The Supreme Court there stated the rule with respect to an arrest without a warrant as follows (p. 193):

> "Where a criminal offense has, in fact, been committed, an officer has a right to arrest without a warrant where he has reasonable ground for believing that the person to be arrested is implicated in the crime, and such officer has a right to search the arrested person without a search warrant. (*People* v. *Caruso,* 339 Ill. 258; *People* v. *Kissane,* 347 *id.* 385.) The right of such search and seizure is incidental to the right of arrest. (*People* v. *McGurn,* 341 Ill. 632.)

It should be noted that the rule on arrest, as just quoted above, includes the phrase "is implicated in the crime." In the case at bar, the trial court refused an instruction tendered by the defendants reading as follows (R. 604, 765):

> "The court instructs the jury that a police officer has the right to arrest without a warrant where he has reasonable grounds for believing that the person to be arrested *is implicated in a crime.*" (Our emphasis.)

This tendered instruction correctly embodies the rule of law stated in the case just cited, and it was error to refuse it. There was evidence from which the jury could find that "Nick" was implicated with Crutale in the robbery of the Pin Up Club (R. 310-311); hence this refused instruction was particularly applicable to the evidence.

In *People* v. *Kissane,* 347 Ill. 385, 389; 179 N. E. 850, a bank had been robbed, and a police officer was furnished with a description of the robber. Two days later, the police

officer saw a person on the street whose appearance tallied with the description of the bank robber; whereupon the police officer arrested this man, searched him and found a concealed weapon upon him. The man was, in fact, innocent of the bank robbery, and upon the trial of the arrested person on a charge of carrying a concealed weapon, a motion was made to suppress the evidence on the ground that the arrest being unlawful, the search was likewise unlawful. The Supreme Court of Illinois sustained the judgment of conviction, holding that the arrest was lawful, (and, therefore, the incidental search also lawful), because the police officer had reasonable ground to believe from the identification information received by him that the man he was arresting had perpetrated the bank robbery, although in fact he was innocent thereof.

In *United States* v. *Spadafora,* (C. A. 7) 181 Fed. (2d) 957, the court held that the arrest of a person by a police officer without a warrant, pursuant to information received from third parties which afforded a reasonable ground for the belief that the arrested person was implicated in a crime which had been committed, constituted a lawful arrest; and that the arrest being lawful, the search was also lawful.

It is respectfully submitted that under the correct rules of law applicable to the arrest of persons by police officers without a warrant, the arrest of plaintiff by the defendants under the uncontradicted circumstances disclosed by the evidence was clearly lawful.

Whether the search of plaintiff's person was legal depends necessarily upon the question whether the arrest was lawful as having been made upon adequate probable cause. The evidence establishes beyond all doubt that police officers Krause and Higgins searched the plaintiff

because (1) they had reasonable grounds to believe and in fact did believe, from the information supplied to them by Crutale, that "Nick" was armed with a gun, (2) they had good reason to believe and in fact did believe from Crutale's description that plaintiff was actually Nick, and (3) the plaintiff actually made two attempts to reach his left hip pocket under his coat with his right hand.

In *People* v. *Edge,* 406 Ill. 490, 94 N. E. (2d) 359, the Supreme Court of Illinois held that where an arrest is lawful, a search incident to such arrest is also lawful. The court said (p. 496):

> "The guaranty of section 6 of article 11 of our constitution is not against all searches and seizures but only against unreasonable search and seizure, and does not extend to immunity from search upon lawful arrest. (*People* v. *Barg,* 384 Ill. 172; *People* v. *Ford,* 356 Ill. 572.) Where the arrest is justified, the accompanying search is also justified. (*People* v. *Tabet,* 402 Ill. 93; *People* v. *Exum,* 382 Ill. 204.)

This court has likewise held that the right to search is an incident to a lawful arrest. (*United States* v. *Rabinowitz,* 339 U. S. 56, at p. 61; 94 L. Ed. 653; *Agnello* v. *United States,* 269 U. S. 20, at p. 30; 70 L. Ed. 145.) In *United States* v. *Spadafora,* (C. A. 7) 181 Fed. (2d) 957, an arrest made upon third party information was held lawful, and the search was sustained as also lawful because incidental to the arrest.

On the issue whether the plaintiff, assuming he were actually "Nick," was subject to arrest without a warrant because he had committed or was about to commit a crime, the uncontradicted evidence showed that the police officers making the arrest acted upon the following information supplied to them by Crutale the confessed robber and the accomplice of "Nick":

(1) Crutale told the police officers that "Nick" had given him the gun with which he had robbed the Pin Up Club. This constituted adequate basis for probable cause that "Nick" had been an accessory before the fact in the commission of a felony.

(2) The victim of the holdup told the police officers that Crutale had an accomplice in that robbery who acted as a "lookout" and who also saw to it that the holdup victim did not notify the police before the robber made his getaway (R. 310-311). The police officers had the right to assume from this information that this accomplice was "Nick," especially in the light of Crutale's statement that "Nick" had given him the gun with which he had committed the robbery, and that he (Crutale) was meeting "Nick" at the Cloverbar to go out on some more robberies with him.

(3) Crutale advised the police officers that "Nick" would be wearing a concealed firearm. This constituted an additional criminal act under Illinois law (Chap. 38, pars. 4 and 5, Ill. Rev. Stat. 1951).

(4) Finally, Crutale told the police officers that he and "Nick" had just arranged over the telephone to meet at the Cloverbar for the purpose of going out on some further robberies that night. This constituted a conspiracy to commit felonies, and was in itself a crime under an Illinois statute relating to criminal conspiracies, which provides in part as follows:

> "If any two or more persons conspire or agree together * * * to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender * * * shall be fined not exceeding $2,000 or shall be imprisoned in the county jail not exceeding one year, or shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or may be so fined and so imprisoned in the county jail or penitentiary." (Chap. 38, par. 139, Ill. Rev. Stat. 1951.)

It was not necessary that the information received by the police officers be sufficient to convict "Nick" of these crimes. (*Brinegar* v. *United States,* 338 U. S. 160, 172-175, 93 L. Ed. 1879, 1889-1890). It was enough that this information induced a reasonable belief in the minds of the police officers that "Nick" had committed or was guilty of these crimes, and that plaintiff whom they found at the Cloverbar was "Nick." The fact that plaintiff was not "Nick" and therefore was innocent of these crimes does not disprove the existence of a reasonable belief in the minds of the police officers that plaintiff was the person "Nick" who was guilty of having committed these criminal acts. The police officers' mistake as to plaintiff's true identity was naturally and reasonably induced by his remarkably close resemblance in appearance and dress to Crutale's description of "Nick" as supplied to the police officers.

It is respectfully submitted, in the light of the uncontradicted evidence, that the arrest of plaintiff was made on adequate probable cause and, therefore, lawful; that the shooting of plaintiff was a direct result of his violent resistance to his lawful arrest and constituted justifiable self-defense; and that the search of plaintiff's person was likewise proper because incidental to the lawful arrest. From this it follows that plaintiff's removal to the House of Correction Hospital for treatment and his subsequent booking on a charge of resisting arrest and his immediate release on nominal bail of $50 posted by himself did not constitute unlawful imprisonment. The defendants were entitled, therefore, to a directed verdict in their favor at the close of all the evidence, and it was error for the District Court to deny their motion so requesting.

B.

Even if the conduct of the defendants was in some degree unlawful, it was in no event either reckless, wilful, wanton or malicious.

Even if we assume that the arrest was for some reason unlawful, there nevertheless was no wilfulness or malice involved in the conduct of any of the defendants. It is completely clear from the evidence that the four police officers embarked on a perfectly lawful mission when they set out for the Cloverbar tavern to arrest the armed felon whom Crutale had described to them as "Nick." The circumstances surrounding the arrest furnish no basis for any finding of intentional or malicious wrong even if, for some reason not descernible to us, the arrest might be considered illegal. The shooting resulted from plaintiff's violent resistance, and even if the arrest was illegal, the shooting, although it may be considered wrongful, cannot be considered wilful or malicious in view of the reasonable belief in the minds of Krause and Higgins that their lives were imperiled by such resistance. The search of plaintiff's person was for the purpose of obtaining the firearm with which Krause and Higgins reasonably believed the person they had arrested was armed. After ascertaining from his identification papers that plaintiff apparently was not "Nick," their conduct was entirely circumspect and considerate of the plaintiff. Even if such conduct involved a continuation of plaintiff's wrongful detention on the assumption that the initial arrest was unlawful, still there was nothing wilful or malicious in the subsequent conduct of the defendants. Plaintiff was first taken to Henrotin Hospital and there given first aid. He was then taken to the House of Correction Hospital for further medical treatment. He was not mistreated there at all, but on the

contrary was accorded every comfort the institution afforded. Then, as soon as his physical condition permitted, he was booked and released on nominal bail to answer a charge of resisting a lawful arrest. The facts constituting such resistance are not denied by plaintiff.

Captain Goldberg, who was entirely unaware of the occurrence until shortly before plaintiff left the hospital, certainly cannot be charged with any participation in plaintiff's arrest, shooting, or search, or in his detention at the hospital even assuming that such detention was the continuation of a prior wrongful restraint initiated by the arrest. Goldberg was at home and on official holiday leave when he was advised of what had happened. He hurried to the police station which he commanded and there received reports from the four police officers that they had gone out to arrest an armed robber; that they had arrested plaintiff reasonably believing him to be the person whom Crutale had described as "Nick"; that plaintiff had resisted arrest; that he was shot as the direct result of such resistance; that when they searched him they discovered for the first time that he was not "Nick" but a Mr. Bucher from Tulsa, Oklahoma; and that he was now at the House of Correction Hospital; that he had come to Chicago to get married; and that he had planned to be married that very afternoon. Whereupon Captain Goldberg arranged to have the plaintiff brought from the hospital to the station, after having ascertained that plaintiff was in physical condition to leave the hospital, and the uncontradicted evidence is that plaintiff told Goldberg that the report made to him by the police officers was correct and that his resistance had been a mistake. Goldberg thereupon did the only thing that he, as a police captain acting upon the reports of police officers, could properly have done. He told plaintiff that it was regrettable that he had been arrested under a mistake

of identity, but that in view of his resistance to the arrest he would be booked on that charge and released on nominal bail. This was accordingly done, and plaintiff was immediately released on nominal bail of $50 posted by himself, for the purpose of enabling him to proceed with his marriage plans.

Captain Goldberg was clearly entitled to act upon the report of the police officers. In view of the mistake as to identity, Goldberg told plaintiff that his arrest was a regrettable occurrence but he did not say that the arrest was unlawful for that reason. Plaintiff admitted to Goldberg that he had resisted the arrest and that it was a mistake for him to have done so. But even if plaintiff had protested his innocence and had denied the fact of resistance to the arrest, Goldberg was under no legal compulsion to disbelieve the police officers and accept plaintiff's version of what had taken place. Captain Golderg was clearly reasonably justified in accepting the police officers' report at face value and leaving it to a court to adjudicate the guilt or innocence of the plaintiff of the charge of resisting a lawful arrest. Had Goldberg ordered plaintiff's release without having him booked, he would have been derelict in his legal duty and could properly have been subjected to serious disciplinary action for so doing.

The Illinois statutes require that one arrested without a warrant shall be taken before a magistrate promptly. (Ill. Rev. Stat. 1951, Chap. 38, par. 660.) Butcher was properly booked at the earliest possible time and his arraignment set for the opening of court.

We earnestly submit that Goldberg's conduct was clearly without animus, clearly without wilfulness or wantonness, clearly not maliciously done, but constituted rather the honest pursuit of the obligations of his office. Wilfulness and wantonness, under the circumstances of this case, sug-

gest a deliberate intention to do harm and to do an injustice to a person, or at the very least, a reckless disregard of the rights of another. Everything in the record by way of positive testimony refutes it, and the huge verdict against Goldberg is a particularly shocking example of the passion and prejudice of the jury.

The same may be said with respect to the huge verdicts against defendants McManus and Miller. They did not participate either in the arrest, shooting or search of the plaintiff. They came into the tavern after all this was over. McManus called for the ambulance which took plaintiff to Henrotin Hospital for first aid and then to the House of Correction Hospital for further treatment. McManus did not even see the plaintiff from the time he called the ambulance until the trial of this case in the District Court in October, 1951. Miller interviewed several bar patrons after plaintiff was taken to the hospital from the Cloverbar. He then made a report of the occurrence to the First District (Central) Police Station. Miller went with Krause to visit plaintiff at the hospital and was present when Crutale was asked whether he could identify plaintiff as "Nick". Miller was present with Krause at the time plaintiff talked with Captain Goldberg at about 3 o'clock P. M. Miller was not present at the hearing of the Municipal Court case. A clear indication of the passion and prejudice of the jury is their verdice under Count 2 in the sum of $65,000 (later reduced to $50,000) against McManus and Miller for the several innocuous things which they did after the arrest, shooting and search had already taken place. An even clearer indication of the jury's passion and prejudice is that they included McManus and Miller in the $50,000 verdict which they rendered under Count 1 which related entirely to alleged conduct (the shooting and wounding of plaintiff) in which the evidence definitely estab-

lished they had no part whatever. The reversal by the Court of Appeals of the verdicts and judgments against McManus and Miller under Count 1 does not cure the error of the verdict under Count 2, because it is clear that the passion and prejudice of the jury was also responsible for the verdict under Count 2. This is further shown by the fact that the jury even included defendant Sain in the verdict under Count 2 although he did not participate in any of the acts done and did not learn of the occurrence until shortly before plaintiff was released from the hospital. Indeed the recognition by the Court of Appeals that Sain was not liable at all stamps the verdict under Count 2 (which included Sain) as based on passion and prejudice, just as the verdict under Count 1 (which included McManus and Miller) stamps that verdict as also based on passion and prejudice. Both verdicts are vitiated by this clear evidence of passion and prejudice, and cannot be revitalized by the Court of Appeals having excluded McManus and Miller from Count 1 and Sain from Count 2. This is so because it cannot be ascertained to what extent this passion and prejudice was responsible for the huge verdicts against the other defendants.

It is earnestly submitted that there is no evidence whatsoever of any wilful, wanton, reckless or malicious wrongdoing by any of the defendants.

C.

Plaintiff's actual damages constitute but a very small proportion of the huge verdicts rendered against the defendants.

On the assumption (the truth of which we by no means concede) that the arrest, shooting, search and further detention of plaintiff was unlawful, the evidence without

contradiction established that plaintiff was not entitled to any substantial award as damages. His special damages, such as medical expenses and damage to his clothing, totaled less than $200. His wound did not incapacitate him to any appreciable extent. He was able to go through with his marriage plans without delay after he was released on Saturday afternoon, which was the day originally scheduled for his marriage, and his physical exertions during the next several days, which included considerable walking, visiting of friends, and driving his car for many miles, showed that his wound did not appreciably impair any of his functions or activities. He went to the doctor several times while he remained in Chicago, and his treatment consisted only of superficial medication and bandaging. He left with his wife for his home in Tulsa, Oklahoma, on schedule; he reported back to work on the very day he originally had planned; and he did not lose a single day's work or a single dollar in wages. Back in Tulsa, plaintiff saw a doctor four times, at three dollars per visit. The first two visits to the doctor were within two weeks after he returned to Tulsa, and consisted merely of having his wound rebandaged. The next two visits were made many months later, and consisted of treatment for a pilonidal sinus condition which was entirely pre-natal and not due to his wound. There is no evidence of any other medical treatment or expense as a result of the wound he suffered. The pilonidal sinus condition did not commence until six months after the shooting and was attributed by plaintiff's own medical witnesses to his prenatal condition of a pilonidal cyst. The attempt by plaintiff's counsel to prove that osteomyelitis might result from the bullet wound in later years (as remote as even 40 years hence) was admitted by plaintiff's own medical witness to be "entirely theoretical" (R. 162). No further

medical treatment of the plaintiff attributable to his wound was proven upon the trial, and the examinations he received in Chicago when he came here for trial were entirely for the purpose of affording testimony as to his present physical condition. The statement in the opinion of the Court of Appeals that plaintiff "underwent continued treatment for his wounds from the time of his release from the Cermak Hospital to the date of the trial" (R. 816) is unsupported by anything in the record, and is an erroneous misapprehension of the proof adduced upon the trial.

Likewise, the statement in the opinion of the Court of Appeals that the bullet wound injured plaintiff "permanently" (R. 814-815) is unsupported by any of the testimony in the record. True, plaintiff's medical witness testified that plaintiff's condition would be "permanent", but the "condition" which was characterized as permanent was not shown to be "serious" to any appreciable extent. There was no bone infection whatever, the bone pathology was completely normal, except for metallic fragments along the course of the bullet, and plaintiff's medical witness admitted that any detrimental consequences from these metallic fragments was remote and entirely theoretical (R. 162). The statement in the opinion that plaintiff's condition was "permanent" constitutes a grave misapprehension of the facts because it is coupled with the word "serious". The opinion states that the bullet passed through plaintiff's buttocks, injuring him "seriously and permanently" (R. 814-815). This gives the impression that plaintiff's condition was permanently serious, rather than only very slightly different from perfect normality. On the basis of the evidence, plaintiff would be entitled to recover as compensatory damages only a very small portion of the huge verdicts rendered, even if we assume that the conduct of

the defendants was for some reason and in some respect unlawful. Indeed, the opinion of the Court of Appeals expressly stated that "it is quite clear * * * that the greater part of the damages allowed under both counts was punitive" (R. 828).

D.

The decision of the Court of Appeals overlooked and failed to apply several well settled yardsticks to the award of punitive damages, namely: (1) they cannot be too disproportionate to the actual damages sustained, (2) they cannot exceed too greatly the criminal penalties specifically provided by law for similar conduct, and (3) they cannot too greatly exceed the financial capacity of the defendants against whom imposed.

The Court of Appeals apparently felt that it could properly affirm the huge judgments because there is "no yardstick, no definite unit of measure, which can be applied to punitive damages * * *" (R. 830). But that does not mean that the jury possesses an unlimited discretion in the imposition of punitive damages. The opinion concedes that the awards were "large, indeed bountiful" (R. 825), that "the greater part of the damages allowed under both counts was punitive" (R. 828). In view of the great disproportion between the compensatory damages proved and the huge amounts of the verdicts, the amount of punitive damages embodied in the verdicts goes far beyond the proper limits of just punishment. While a slight excessiveness may be tolerated in this field, it is not true that punitive damages can never become outrageously excessive. The law is clear that punitive damages, to be upheld, must be within reasonable limits. They must bear some fair relation to the actual damages sustained, and cannot be so many times a multiple

of the compensatory amount as to clearly brand them as having been arrived at through passion and prejudice.

In *Selimos* v. *Christ,* 331 Ill. App. 412, the court held that an award of exemplary damages should not be disproportionate to the actual damages sustained.

In *Aladdin Mfg. Co.* v. *Mantle Lamp Co. of America,* (C. A. 7) 116 Fed. (2d) 708, the court, speaking of exemplary damages, said (p. 717):

> "They are not a favorite in law, however, * * * and therefore, to be allowed only with caution and confined within narrow limits. Whether damages be compensatory or exemplary, if unliquidated, when determined by the trier of facts, their propriety cannot be governed or measured by any precise yardstick. They must bear some reasonable relation to the injury inflicted and the amount must rest largely in the discretion of the trier of facts, a discretion not to be arbitrarily exercised. Ordinarily this court will interfere only where it appears that an injustice has been done or it is clear that there has been error in law."

The court thereupon carefully analyzed the award of damages by the court below and concluded it was excessive. The court (per Mr. Justice Lindley) said (p. 717):

> "For such injury it was entitled to compensatory damages and in addition such *limited exemplary damages* as the facts and circumstances justify." (Emphasis supplied.)

Thus the court whose judgments are here sought to be reviewed has itself recognized and applied the doctrine that damages are not unlimited merely because they are exemplary,—a doctrine completely departed from by the same court in the case at bar.

In *Eshelman* v. *Rawalt,* 298 Ill. 192, 197-198; 131 N. E. 675, the Supreme Court of Illinois reversed a judgment which awarded a large amount of punitive damages in an

action for criminal conversation, an amount far larger that what the Criminal Code prescribed as punishment for the same offense.

Under the Criminal Code of Illinois, the penalty for "assault and battery" is a fine of from $3 to $100 and for "aggravated assault and battery" a fine of from $3 to $100 or imprisonment in the county jail for not more than one year, or both. (Chap. 38, par. 57, Ill. Rev. Stat. 1951.) By relating the damages here awarded to the penalty which the State has seen fit to fix as its idea of punishment, the grossly disproportionate quantum of the judgments becomes so clear that this court must surely recognize that the jury's verdicts were outrageously huge and quite beyond the limits tolerated by the law.

Thus, while there is not an *exact* yardstick for the measurement of punitive damages, it is not true that there is no yardstick at all. Yet it is clear from the Court of Appeals' opinion that the huge verdicts were affirmed because of its erroneous conclusion that there was "no yardstick, no definite unit of measure, which can be applied to punitive damages" (R. 830).

The Court of Appeals also overlooked the principle that the amount of punitive damages cannot too greatly exceed the financial capacity of the persons against whom imposed. An important element to be considered in determining whether an award of punitive damages is grossly excessive is the financial capacity of the defendant. A huge judgment against a defendant of modest means will not be tolerated as a proper award of punitive damages. In this respect, punitive damages are even more limited by the law than compensatory damages, because the modest means of a defendant furnishes no basis for awarding a plaintiff less than his actual damages no matter how high they may be. Punitive damages, however, since they are awarded

as punishment, stand upon a different footing, and will not be permitted to assume the proportions of cruel, unusual or extraordinary punishment.

Evidence was introduced in the court below of the limited financial means of the police officers, Krause, Higgins and McManus. It showed that each of them earned a modest salary of about $4,000 a year; that they had very few assets, heavily mortgaged homes of unpretentious character, and owed additional debts; that their over-all financial worth was meager. To inflict judgments totalling $100,000 upon Krause and Higgins, and a judgment of $50,000 against McManus, is to inflict cruel and inhuman punishment upon them more severe than long terms of imprisonment. Can it be said to be "within the bounds of tolerable conclusion" to burden defendants Krause and Higgins with judgments representing the total annual salary of each of them for the next 25 years? Is it "within the bounds of tolerable conclusion" to subject defendants McManus and Miller to judgments which it would take each of them over 12 years of total annual earnings to satisfy, and this quite apart from the interest upon such judgments?

The fact that no evidence of financial means was introduced as to Miller and Goldberg does not render the $50,000 verdicts and judgments rendered against each of them any the less outrageous, especially when we consider that neither of them participated either in the arrest, shooting or search. So far as Goldberg is concerned, not only was he not a party to the arrest, shooting, or search, but he also had no hand whatever in bringing plaintiff to the House of Correction Hospital or in keeping him there. No clearer indication of the passion and prejudice of the jury is needed than the rendition of the $50,000 verdict against defendant Goldberg, who did nothing more than perform

his legal duty as a police captain acting upon reports made to him by police officers, and the truth of which the plaintiff did not contradict but in fact admitted when interrogated by Goldberg.

The verdicts and judgments were clearly far beyond "the bounds of tolerable conclusion" as to each and all of the defendants. The evidence shows that only 12 or 13 hours elapsed between the time that plaintiff was placed under arrest at the Cloverbar tavern on that early Saturday morning and his release on nominal bail on that same day. During most of these 12 or 13 hours, plaintiff was in the hospital being medically treated. Yet the jury awarded him $65,000 in its verdict under Count 2 which alleged the arrest and imprisonment. This amounts to an allowance of $5,000 for each hour of plaintiff's detention. The remittitur to $50,000 still left the allowance in the sum of about $4,000 an hour. Bearing in mind that the verdict under Count 1 allowed plaintiff an additional $50,000 for the assault, the verdict under Count 2 becomes positively "monstrous".

We submit that the huge judgments which have been affirmed by the Court of Appeals are without exception far beyond "the bounds of tolerable conclusion". The judgments are grossly excessive as to Krause and Higgins, and intolerably outrageous as to McManus, Miller and Goldberg. The verdicts and judgments below represent a shocking miscarriage of justice by the jury, which the trial court ought not to have countenanced, and which the Court of Appeals should not have permitted to stand.

E.

Inasmuch as the defendants were not guilty of any wilful, wanton, reckless or malicious conduct toward the plaintiff, there was no legal basis for the award of any punitive damages.

The trial court instructed the jury that if they found from the evidence that plaintiff was entitled to compensatory damages under either or both counts of the complaint, they might add to such compensatory damages an additional sum as smart money or punishment, if they found that the acts complained of in either or both said counts were done wilfully or intentionally or with some element of aggravation (R. 595-596, 762). This in substance constituted the instruction on punitive damages.

The defendants objected to the giving of this instruction or any other instruction on the question of punitive damages on the ground that there was no evidence to support such an instruction (R. 595-596).

This instruction on punitive damages was reversibly erroneous for several reasons. *First,* there was no evidence that any of the defendants acted either maliciously or in willful or wanton disregard of plaintiff's rights. *Second,* some of the defendants did not participate at all in the arrest, shooting, wounding or searching of plaintiff, and some of them did not participate in his subsequent detention until booked and released on nominal bail.

Assuming that any defendant was culpable at all, not all of the defendants were equally culpable. Furthermore, not all of the defendants were guilty of any malicious, willful or wanton conduct even if we assume that some of them were. Yet the instruction on punitive damages made no differentiation whatever as between the conduct of the sev-

eral defendants, nor were separate verdicts submitted or rendered in accordance with their respective guilt or innocence. On the contrary, all of the defendants were herded together into one category for the purpose of punitive damages. There was only a single general instruction on that issue applicable to all of the defendants, and only one verdict on each count for the purpose of such an assessment.

There being no separate verdict for compensatory as distinguished from punitive damages, the two general verdicts which were rendered must each be presumed to contain an award of punitive damages. Likewise, because there were no separate verdicts for compensatory and punitive damages, it cannot be known how much of the respective verdicts on Counts I and II represented compensatory and how much represented punitive damages. However, in view of the meager amount of actual damages proved, based upon the very small outlay by plaintiff for medical services, the absence of any time or wage loss by plaintiff resulting from his injury, or of any bone infection or other pathological condition traceable to his wound, and the testimony of his own medical witnesses of the unlikelihood of any further complications arising therefrom, it must be concluded that by far the largest portion of the amounts awarded under Counts I and II were for punitive damages. Indeed, the Court of Appeals expressly so stated in the opinion below (R. 828).

The rule is well settled that unless there is some evidence of wilful, wanton, reckless or malicious wrongdoing, no award of punitive damages can properly be made. (*Williams* v. *Reil,* 20 Ill. 147, 148; *Becker* v. *Dupree,* 75 Ill. 167, 170; *Eshelman* v. *Rawalt,* 298 Ill. 192, 197; 131 N. E. 675; *Trumbo* v. *C. B. & Q. R. R. Co.,* 389 Ill. 213, 221; 59 N. E. (2d) 92; *Countryman* v. *Sullivan,* 344 Ill. App. 371, 373; *Shelton* v. *Barry,* 328 Ill. App. 497, 511.)

Considering the fact that none of the defendants was guilty of any malicious, willful or wanton conduct, the instruction on punitive damages would have been erroneous even had there been a similar instruction given as to each defendant separately. However, since all of the defendants were not equally culpable, it was additionally erroneous to give a single instruction applicable to all of the defendants permitting a punitive damages award.

F.

In an action for damages jointly against multiple defendants, an award of punitive damages cannot properly be made against all of them in a single joint verdict, if any one of them is not guilty of such conduct as would warrant the imposition of punitive damages.

The rule is well settled that in a suit for damages jointly against multiple defendants, not all of whom are equally culpable, an award of punitive damages cannot properly be mde against all of them in a single verdict.

In *Becker* v. *Dupree,* 75 Ill. 167, the Supreme Court of Illinois held that where two persons are sued for damages for an alleged tort, and one of them is not chargeable with malicious conduct or recklessness, exemplary damages cannot be recovered against both.

In *Murphy* v. *Curran,* 24 Ill. App. 475, the court approved as good law an instruction on punitive damages which stated that the amount thereof should be not more than would be assessed against the defendant least at fault, and that no verdict for such damages would be assessed against all of the defendants in a joint suit against them where one of them was not properly subject to such an assessment. The court said (p. 479):

> "And the instruction also recognizes the principle that the finding of exemplary damages should be no

more than would be assessed against the defendant least at fault. That is, that there should not be a verdict for exemplary damages for all in a joint suit where one of the defendants was not subject to such assessment."

In *Grund* v. *Van Vleck,* 69 Ill. 478, 481, a judgment for plaintiff was reversed because of an instruction permitting an award of exemplary damages against all of the defendants, some of whom were not parties to the willful conduct complained of.

This court enunciated the same rule in *The Amiable Nancy,* 3 Wheat. 546, cited in *Grund* v. *Van Vleck,* 69 Ill. 478, at page 481.

Where only one of several defendants is liable for exemplary damages, a separate verdict for such damages should be returned against the particular defendant so liable; and it is error to permit an award of such damages in a single verdict against joint defendants where not all of them are properly subject to such an award (Volume 17, Corpus Juris, Sec. 288, p. 989, note 46.)

The Court of Appeals did not cure this error by reversing the judgments as to Miller and McManus under Count 1 and as to Sain under Count 2. In so disposing of the punitive damages issue, the Court of Appeals overlooked that the impropriety of awarding punitive damages verdicts against those defendants whom it held were not liable for such damages was not cured by reversing the judgments as to them alone. The rule is that punitive damages are not awardable against *any* defendant if not properly awardable against *all* of them, and if a plaintiff joins in a single suit some defendants who are, and some who are not, liable for punitive damages, he waives such damages as to *all* of them, and he is limited to the recovery of compensatory damages alone. (*Pardridge* v. *Brady,* 7 Ill. App. 639, 644-645; *Gill* v. *Selling,* 125 Or. 587, 267 Pac. 812, 815.)

In Volume 2, Sutherland on Damages (4th Ed.), Section 407, it is stated:

> "If a wrong is done by two or more persons jointly and all are sued together, if only one of them, or less than all, acted upon such motives as are condemned by the law and punished by exemplary damages, the motive of some will not be imputed to the others, and the liability of the latter will not extend beyond compensatory damages. In such a case the plaintiff has his election to proceed against any or all of the wrongdoers. **By making them all defendants he waives his right to exemplary damages, if some of them are not subject thereto.**" (Emphasis supplied.)

From these authorities it is clear that the plaintiff's election must be made before the jury retires and before the verdict is returned. Neither the trial court nor the reviewing court can undo the error except by limiting the recovery to compensatory damages alone, if separately assessed; and if compensatory and exemplary damages are intermingled in the verdict without separation, then a new trial must be ordered as to all the defendants.

G.

Moreover, punitive damages are not awardable against Captain Goldberg for the acts of any of his subordinate officers not directed or participated in by him, nor against Miller or McManus for any of the acts of their fellow police officers Krause and Higgins, to which they were not parties.

In *Lake Shore, etc. Ry. Co.* v. *Prentice,* 147 U. S. 101, 37 L. ed. 97, this court held that a railroad company was not liable for exemplary or punitive damages for the illegal, wanton and oppressive arrest of a passenger by a conductor of one of its trains, which conduct it had in no way authorized or ratified. The principle that punitive dam-

ages are not awardable where the liability is based merely upon the doctrine of respondeat superior was eloquently stated by this court as follows (pp. 107-108):

> "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent. This is clearly shown by the judgment of this court in the case of *The Amiable Nancy*, 3 Wheat. 546."

In *Neville* v. *Chicago & Alton R. R. Co.*, 210 Ill. App. 168, the Appellate Court of Illinois laid down the following rule (Syl. 8, p. 169):

> "The doctrine of respondeat superior does not apply where liability depends solely upon the contract of employment, so as to inflict exemplary damages upon the master for injuries resulting from conduct of a servant which he neither authorized, ratified nor participated in."

The foregoing doctrine applies with even greater force in the case at bar where the master-servant relationship does not exist at all as between any of the defendants. It has been repeatedly held that public officers do not stand in the relation of employer-employee to each other so as to be subject to liability on the theory of *respondeat superior*. (*Reiter* v. *Illinois National Casualty Co.*, 397 Ill. 141, 152; 73 N. E. (2d) 412; cert. den. 332 U. S. 791; *Klam* v. *Boehm, et al.*, (Idaho) 240 Pac. (2d) 484, 485-486.)

Thus Captain Goldberg is not chargeable with liability for any acts of the police officers under his command which he neither authorized nor participated in. No respondeat

superior liability can be imposed upon him. All he did was to have plaintiff booked and released on nominal bail. He did not direct or participate in the arrest, shooting or searching of plaintiff, or in his being brought to and kept in the House of Correction Hospital. The verdict of $65,000 (reduced by remittitur to $50,000) against defendant Goldberg is a travesty upon justice, and it shows to what pitch of prejudice the jury were inflamed by the numerous errors and improprieties of the trial court and plaintiff's counsel during the course of the trial.

Likewise, no punitive damages are awardable against defendants Miller and McManus for the acts of their fellow-officers Krause and Higgins in which they did not participate. The huge verdicts against Miller and McManus likewise bespeak the passion and prejudice of the jury, since neither McManus nor Miller took any part in the arrest, shooting or searching of the plaintiff.

Assuming, *arguendo,* that Krause and Higgins, were guilty of willful misconduct, (a proposition which the evidence clearly refutes), neither McManus, Miller, nor Goldberg can be said to have been guilty of any willful misconduct on any conceivable theory. From this it necessarily follows that the giving of the instruction on punitive damages and the rendition of the huge verdicts on each count, (which being general in form must be presumed to be based on the allegations of willful and malicious wrong), are erroneous as to any defendant not liable for punitive damages. And since the verdicts on each count are single and inseparable, and are against all of the defendants, they cannot stand as to any of the defendants and must be set aside as to all of them.

H.

Since the verdicts and judgments embodied punitive damages in a large but undetermined amount, the reversal of the judgments as to some of the defendants requires a reversal as to all of them; otherwise, great prejudice will result to those defendants as to whom the judgments were affirmed.

The affirmance of the judgments as to less than all of the defendants against whom they were rendered below constitutes serious error in another controlling particular. There were four defendants to the judgment rendered on Count 1, and six defendants to the judgment rendered on Count 2. By reducing the number of defendants from 4 to 2 in the judgment under Count 1, and from 6 to 5 in the judgment under Count 2, the Court of Appeals imposed a heavier burden upon the remaining defendants than did the jury and the court below. We are not unmindful of the modern rule which permits a reviewing court to reverse as to some and to affirm as to the remainder of joint parties to a tort judgment. However, there is an important qualification to that rule, namely, that if a reversal of the judgment as to some will result in prejudice to those as to whom it is affirmed then the judgment must be reversed as to all and a new trial granted.

In *Albright* v. *McTighe* (C. C. W. D. Tenn.), 49 Fed. 817, 823-824, which is a leading (although *nisi prius*) decision on the subject, an action for false imprisonment and malicious prosecution was filed against three defendants doing business as a partnership, and a single verdict and judgment was rendered against all three of them. On motion for a new trial, the trial court held that a case was made out against two of the defendants but not against the third,

and the problem presented was whether the court should set aside the verdict as to the one and deny the motion for a new trial as to the other two. The trial court finally concluded to grant a new trial as to all of the defendants, because, as the court said, it would be unjust to require only two to share in the burden of the verdict which was rendered against three; that to do so would be tantamount to the rendition of a verdict by the court itself in usurpation of the jury's function.

An extensive annotation on the entire subject of whether a reviewing court may properly affirm a judgment against less than all of the parties defendant against whom it was rendered on a jury verdict, appears in Volume 143 of American Law Reports, Annotated (143 A. L. R. pp. 7-55). It is there pointed out that the common law rule prohibits such procedure even in actions against joint tortfeasors whose liability is both joint and several (p. 9). Some Illinois cases illustrating this common law doctrine are cited at pages 12-13 of this annotation. The more modern or general rule is there stated to be that an affirmance of the judgment as to some and a reversal as to the remainder of the defendants is within the power of the reviewing court, but will not be exercised where such procedure will result in prejudice to the parties defendant against whom the judgment is permitted to stand (143 A. L. R., p. 14 *et seq.*, p. 20 *et seq.*).

One important qualification, which is as invariable as the rule itself, is that a reversal of the judgment as to some requires a reversal as to all, where under the circumstances of the case it is apparent that the jury would not have rendered the verdict which it did if it had anticipated that the final discharge of the liability under such verdict would (by future court action) be placed upon less than all of the defendants against whom it was rendered. In such a case,

failure to set aside the judgment as to all of the defendants, including those as to whom no error was committed, has been held to work an injustice upon those remaining in the case (143 A. L. R., p. 31 *et seq.*). As illustrative of this qualification of the rule, the annotation cites the following cases among many others (143 A. L. R., p. 31): *Albright* v. *McTighe* (C. C. W. D. Tenn.), 49 Fed. 817; *Washington Gas Light Co.* v. *Lansden,* 172 U. S. 534, 43 L. Ed. 543; and *Strand* v. *Griffith* (C. C. D. Minn.), 109 Fed. 597.

In *Washington Gas Light Co.* v. *Lansden,* 172 U. S. 534, 43 L. Ed. 543, a single verdict against a corporation and two of its officers was rendered in a libel action. Evidence was introduced on the trial as to the wealth of the corporation as a basis for assessment of punitive damages. This court held that since it had to reverse the judgment as to the corporation and one of the officers, it must perforce reverse also as to the other officer even under the assumption that no error was committed upon the trial as to such other defendant which in itself would call for a reversal as to him (172 U. S. 534, at pp. 555-556).

This court then further pointed out that in a case where punitive damages are awarded the rule against affirming the judgment as to some and reversing as to others is even more stringent. The court said (172 U. S. 534, at p. 553):

> "Punitive damages are damages beyond and above the amount which a plaintiff has really suffered, and they are awarded upon the theory that they are a punishment to the defendant, and not a mere matter of compensation for injuries sustained by plaintiff. While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only. As the verdict must be for one sum against all defendants who are guilty, it seems to be plain that

> when a plaintiff voluntarily joins several parties as defendants, he must be held to thereby waive any right to recover punitive damages against all, founded upon evidence of the ability of one of the several defendants to pay them."

Thus in cases in which the jury has awarded punitive damages, the courts have taken the firm view that upon a reversal of the judgment as to one of several joint tort-feasors, it must be set aside also as to the others (143 A. L. R., pp. 41-43, and cases cited).

In *Landseidel* v. *Culeman*, 47 N. D. 275, 181 N. W. 593, an action for malicious prosecution and false imprisonment was brought against three defendants, and a verdict and judgment rendered against all three. On appeal it was found that the facts were not sufficient to impose liability against one of them. The court held that the verdict against all of the defendants must be reversed so far as the punitive damages were concerned, since it could not be assumed that the verdict would necessarily have been the same if any one of the defendants was not legally answerable for the commission of the wrong for which the punitive damages had been assessed. The Court said (p. 595):

> "If any one defendant be not answerable, a joint award of punitive damages against him and his co-defendants cannot stand, for there is no way of determining the amount the jury considered as appropriate punishment for his share in the wrongful conduct. See 2 Sutherland on Damages, § 407."

I.

Inasmuch as the verdicts in the case at bar were rendered against some defendants held by the Court of Appeals not to be liable at all, the fact that these verdicts included punitive damages in large measure requires a reversal of the judgments as to all of the defendants and the remandment of the cause for a new trial.

In the case at bar, it would be pure conjecture to assume that the jury would have returned a $50,000 verdict under Count 1, if it believed that by future court action the verdict would be sustained as to only two of the four defendants against whom it was rendered. Similarly, it cannot be assumed with any degree of certainty that the jury would have returned a verdict of $50,000 under Count 2 against five defendants instead of the entire six of them. Inasmuch as the verdicts admittedly consist of punitive damages in greater part (R. 828), and there was no line drawn between the amount of compensatory and the amount of punitive damages involved in each verdict, the Court of Appeals, under the authorities above cited, had no alternative except to reverse the judgments and set aside the verdicts as to all of the defendants and to remand the cause for a new trial.

The injustice to the defendants against whom the judgments have been affirmed is further enhanced by the fact that evidence as to financial means was offered only with respect to Krause, Higgins and McManus (R. 367-368, 473-474, 497-499). These three defendants were shown to be persons of very modest means. The jury may well have assumed that the other defendants were persons of considerable means and that this would alleviate the burden of the judgments against the defendants of lesser financial

capacity. Yet defendants Krause and Higgins remain as the sole judgment debtors under Count 1, the judgments against Miller and McManus under Count 1 having been reversed by the Court of Appeals (R. 831), and the judgment under Count 2 stands affirmed as to the five petitioners herein, unaided by the financial capacity of defendant Sain who was included in the verdict under Count 2 but as to whom the Court of Appeals reversed (R. 831).

It is respectfully submitted, therefore, that under the special facts and circumstances here presented the only manner in which the injustice to the defendants remaining in the case can be cured is to reverse the judgments as to all of the defendants and remand the cause for a new trial.

J.

The trial court should have granted the motion of the defendants for a mistrial based upon the fact that the trial court's prejudicial remarks, characterizing the defendants' conduct as "outrageous", came to the attention of at least three of the jurors during the course of the trial. The decision of the Court of Appeals sanctions this clearly erroneous ruling.

We shall not repeat in detail what we have already set forth in the statement of facts as to what occurred in this connection. The trial judge had made references to the conduct of the defendants, and termed such conduct "outrageous" (R. 115-116). These remarks were made outside of the presence and hearing of the jury. However, great publicity was given to these remarks of the trial judge, and they appeared in the Chicago Daily Tribune, the Chicago Daily News and the Chicago Sun-Times. See Exhibits A, B and C attached to the motion of the defendants to withdraw a juror and continue the case (R. 19-23). The trial

court denied said motion (R. 23). The colloquy between court and counsel during the hearing on said motion for a mistrial appears in the Record, at pages 227-237. A reading of this colloquy will show that the trial judge felt that the three jurors, who stated that they had seen the articles, knew that the published articles referred to the case before them and that they might have become prejudiced thereby (R. 234). The trial judge in fact suggested that the three jurors who admitted seeing the articles should be excused from further hearing of the cause, and that the trial should proceed before the remaining nine jurors. The defendants did not agree to this procedure, and the trial court ordered the case to go forward before the entire panel of twelve, including the three jurors who had admitted reading the headlines.

We submit that the great prejudice resulting to the defendants from these remarks of the trial court could not be and were not overcome by any admonition given to the jurors by the court not to consider these articles as evidence in the cause and to attempt to free their minds from any effect which these articles might have had upon them. Indeed, the Court of Appeals adverts to the circumstance that the trial court cautioned the jury not to be influenced by anything they might have read in the newspapers (R. 822). However, the incurability of the prejudice resulting from such adverse publicity was expressly recognized by this court in the case of *Krulewitch* v. *United States,* 336 U. S. 440, 453, 93 L. Ed. 790, 799, where Mr. Justice Jackson declared:

> "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

The foregoing language was quoted by the Court of Appeals for the First Circuit in the recent case of *Delaney* v. *United States* (C. A. 1), 199 Fed. (2d) 107, at p. 112.

It is interesting to point out in this connection that counsel for the plaintiff stated that he was not worried about the Court of Appeals, if plaintiff received a verdict in the case. The colloquy in this respect is as follows (R. 235):

> "By the Court: Are you gentlemen willing to try the case with those three jurors eliminated?
>
> By Mr. Herr: No, sir.
>
> By the Court: Well, I guess what you really want is a continuance or error in the record.
>
> By Mr. Cashen: It is for the Circuit Court of Appeals, and I am not worried about the Circuit Court of Appeals if we get a verdict in this case."

There is no need to cite authorities for the proposition that a verdict and judgment based upon an unfair trial should not be permitted to stand. The prejudice to the defendants by virtue of these articles containing the trial judge's intemperate remarks having come to the attention of at least three of the jurors was overwhelming. It is also quite probable that the interrogation of all the jurors as to whether they read the articles induced in them a curiosity which may have been satisfied during the further progress of the trial. The jury's prejudice found clear expression in the grossly excessive verdicts rendered.

In Volume 64, Corpus Juris, Sec. 91, pp. 90-91, note 79, it is stated:

> "A remark or comment [by the trial court] which is shown to be prejudicial to the rights of the party complaining, or which is such that it may be assumed prejudice will result therefrom, is fatal to the validity of the trial; * * *." (Words within brackets supplied.)

Again, in Volume 64, Corpus Juris, Sec. 92, p. 91, note 87, it is said:

> "No comment or remark should be made by a judge, during the trial of an action, which may tend to excite

> prejudice or hostility in the minds of the jury toward one of the parties litigant, or sympathy for the other; * * *."

In *Hansen* v. *St. Paul City Ry. Co.* (Minn.), 43 N. W. (2d) 260, the Supreme Court of Minnesota said (p. 264):

> "The responsibility of striving for an atmosphere of impartiality during the course of a trial rests upon the trial judge. His conduct in trying a case must be fair to both sides, and he should refrain from remarks which might injure either of the parties to the litigation.
>
> * * * *
>
> The courts represent the principle of justice under the law. * * * Thus, the extraordinary prestige of the trial judge, based upon public confidence in his fairness and integrity, creates in turn an extraordinary obligation to refrain from any act, word, sign, gesture, or inflection of voice, the effects of which would be to emphasize a predisposition on the part of the court toward one side or the other in connection with the legal controversy. Where, as here, the record shows a departure from this standard which might have prejudiced the rights of the losing party, we are compelled to direct a new trial."

In the recent case of *People* v. *Marino*, 4 4 Ill. 445, the court said (pp. 450-451):

> "Jurors are ever watchful of the attitude of the trial judge and his influence upon them is necessarily and properly of great weight, thus his lightest word or intimation is received with deference and may prove controlling."

Although the prejudicial remarks of the trial court were made outside the presence and hearing of the jury, the three jurors who read the headlines knew that the remarks were made by the trial judge, and they could not have failed but to have been greatly influenced by them to the defendants' prejudice. These remarks were of such an

inflammatory nature as to be incurable by the later admonition that they should be disregarded, and the fact of their incurability is reflected in the huge size of the verdicts returned by the jury.

It is respectfully submitted that the Court of Appeals improperly rested its decision on this issue upon the circumstance that each of the three jurors, who admitted reading the headlines of the newspaper articles in question, answered that they had read the "headline" (R. 823). This reference to the singular was used as the basis for the Court of Appeals' conclusion that the three jurors may all have read only the one innocuous headline and not either of the other two offending headlines (R. 823). We submit that no such quibble between the singular and plural forms of a word should be sanctioned with respect to such a serious matter as to whether the defendants have suffered overwhelming prejudice because of these improper remarks of the trial judge. The strong probability that prejudice *might have* resulted has been held to be sufficient for reversal. In *Hansen* v. *St. Paul City Ry. Co.*, (Minn.), 43 N. W. (2d) 260, 264, the court declared that where the trial judge acts or speaks in a manner showing bias or hostility against one of the parties to the litigation, it is sufficient for reversal that his conduct "might have prejudiced the rights of the losing party."

It is not essential that direct proof be adduced that the offending headlines and articles actually came to the attention of the jury. The newspapers in which these articles were published are of large circulation and widely read. Common sense and experience leads to the conclusion that the jurors must have read not only the headlines but the text of the articles as well. The trial court itself recognized this, saying: "Oh, I think they [the jurors] knew it was an article relating to the case" (R. 234). The Court of

Appeals (not being present on the trial) had no basis for concluding otherwise.

In *Day* v. *Thomson,* 305 Ill. App. 29, the court held that improper comments by the trial court which received newspaper publicity must be presumed to have come to the jury's attention without the need of direct proof to that effect. The court said (p. 36):

> "These remarks of the court were commented on and in part published in the newspaper article. Common sense tells us this newspaper article was undoubtedly read by some if not all of the jurors, and common sense and experience tells us that the jurors, while they were hearing the case, must have heard about and discussed the judge's remarks."

In *Meyer* v. *Cadwalader* (C.C.Pa.), 49 Fed. 32, the court stated as follows (p. 36):

> "It is idle to say that there is no direct evidence to show that the jury read these articles. They appeared in the daily issues of leading journals, and were scattered broadcast over the community. The jury separated at the close of each session of the court, and it is incredible that, going out into the community, they did not see and read these newspaper publications. That these published statements were well calculated to prejudice the jury against the plaintiffs and deprive them of a fair trial is a proposition so plain that it would be a sheer waste of time to discuss it. Good ground, therefore, here appears for setting aside the verdict."

In *People* v. *Murawski,* 394 Ill. 236, the trial was commenced and the jurors were permitted to separate and go to their homes. The following morning, the only morning newspaper in the city published an article referring to certain alleged criminal charges made against the defendant on prior occasions. The defendant moved for a mistrial and attached to the motion a copy of the newspaper article complained of. The court denied the motion for a mistrial,

and a verdict and judgment of conviction were entered against the defendant. The Supreme Court of Illinois reversed because of the trial court's refusal to grant a mistrial, stating (p. 239):

> "Defendant in error seeks to justify the action of the court in refusing to declare a mistrial on the ground that there is no positive proof in the record that any of the jurors had read the particular article complained of. As pointed out by this court in *People* v. *Marmon*, 389 Ill. 478, any attempt to have questioned the jurors to ascertain whether they had read the published article would have disclosed it to the entire jury."

Counsel for defendants argued to the trial court that the appearance of the newspaper articles should afford sufficient basis for a mistrial without interrogating the jurors whether they had read them (R. 228-229), but the trial court insisted that this be done (R. 230). This interrogation of the entire jury merely accentuated the probability of further disclosure and of further resultant prejudice to the defendants.

We respectfully submit that the decision of the Court of Appeals on this point is replete with error and sanctions judicial conduct which resulted in overwhelming prejudice to the defendants and deprived them of a fair and impartial trial to which they were entitled as an essential ingredient of due process of law.

K.

The release of all claims was not executed by plaintiff under duress of imprisonment; nor was there any fraud either in the execution or in the inducement thereof; nor was there any failure of consideration therefor. The defendants were entitled to a directed verdict in their favor on the basis of the release alone.

The Court of Appeals upheld the ruling of the trial court that the release (Plaintiff's Exhibit 20, R. 704-705) was executed by plaintiff under duress of imprisonment because he was in court as a defendant on the hearing of the charge of resisting arrest when he signed the release (R. 825-826). We submit that the Court of Appeals erred in so holding. Plaintiff had been released on nominal bail of $50 posted by himself. This constituted a termination of his legal custody, not a continuation thereof. In *United States* v. *Gordon,* (C.A. 8) 190 Fed. (2d) 16, the court said (p. 19):

> "The rules and rights of the parties in criminal and civil bail are similar in many respects. The accused or principal in either case is released from the custody of the law * * *, and it is said that the object of bail is to relieve the accused of imprisonment * * *."

Inasmuch as plaintiff posted the cash bond himself, there was no surety who had any control over his movements or who could take him into custody to insure his appearance at the hearing. While plaintiff was admittedly motivated by his desire to be freed of the charge against him when he signed the release (R. 181), he was not in legal custody when he was present at the hearing and hence was not under any imprisonment or duress of imprisonment when he executed the release. Plaintiff testified that he conferred with his attorney about the release, and that he read it before he signed it (R. 181-182). Thus there was no fraud in its execution or inducement.

The stated consideration for the release was the dismissal of the complaint against him for resisting a lawful arrest (R. 704-705), and the Court of Appeals held that there was a failure of consideration because plaintiff was found not guilty instead of having the case dismissed against him (R. 825). However, the record shows that the finding of not guilty was not made by the trial court until after it had been advised that the release had been executed (R. 183). Thus, clearly, there is no basis for the conclusion that the execution of the release was not the basis for the finding of not guilty.

It is respectfully submitted that the defendants fully established their affirmative defense of release and were entitled to a directed verdict in their favor at the close of all the evidence.

L.

The Court of Appeals erred seriously in holding that the trial court did not abuse its discretion in denying the defendants' motion for a medical examination of the plaintiff under Rule 35 of the Federal Rules of Civil Procedure.

Rule 35 of the Federal Rules of Civil Procedure grants to a defendant the right to require a plaintiff to submit to a physical examination by a doctor selected by the defendant, in a cause where plaintiff's physical condition is a material issue.

Since plaintiff was suing to recover damages for injuries sustained by his having been shot and wounded, his physical condition at or about the time of the trial was a very crucial issue. In presenting their motion to require plaintiff to submit to a medical examination by a physician selected by the defendants, it was pointed out to the court that the reason why such application was not made sooner

was because plaintiff returned to Tulsa in less than a week after the shooting, and claimed he could not afford to travel back to Chicago for the purpose of such an examination (R. 172). Consequently, when plaintiff was here for the purpose of the trial of the cause, his presence in Chicago afforded to the defendants the first feasible opportunity for obtaining such an examination. The application for the examination was made on a Friday, and the trial was to be adjourned from Friday until the following Monday (R. 172). Counsel for the defendants pointed out that this would permit the medical examination of plaintiff and the submission of a copy of the doctor's findings to the plaintiff in time for its study by plaintiff and his counsel prior to the resumption of the trial on the following Monday (R. 172). Notwithstanding all this, the trial court denied the motion of the defendants on the ground that it was not seasonably made, and refused to require plaintiff to submit to such an examination (R. 174-175). The hearing upon said motion and the denial of it by the trial court appears at pages 171-175 of the Record.

We submit that no inconvenience would have resulted to the court or to the plaintiff by the allowance of this motion to require plaintiff to submit to a physical examination by a doctor selected by the defendants. This was a substantial right which Rule 35 of the Federal Rules of Civil Procedure accords to a defendant against whom damages are sought for physical injuries. The examination was most vital to a true appraisal of the amount which plaintiff was entitled to recover for his injuries, assuming that the conduct of the defendants was unlawful. Without such examination the defendants had no opportunity to introduce medical evidence to refute the medical facts presented by the plaintiff. The Court of Appeals held that because Rule 35 (a) provides that the trial court "may order" such

an examination, it was a matter within its sound discretion, and that the denial of the motion was not an abuse of such discretion.

We submit that, under the circumstances here presented, the trial court clearly abused its discretion in denying this motion, and deprived the defendants of a very important right granted by court rule to insure against the rendition of such outrageously excessive verdicts as were returned in the case at bar.

M.

The trial court committed serious error in admitting in evidence, over the objection of the defendants, the correspondence between plaintiff and Assistant Corporation Counsel Barth relative to the informal suggestion that a purse of one hundred dollars would be collected for the purpose of compensating plaintiff for his injuries.

The trial court received in evidence, over the objection of the defendants, Plaintiff's Exhibits 21 and 22 which were letters from plaintiff to Mr. Barth suggesting that he was promised some sort of compensation for his unfortunate experience and that he hoped he would receive some reimbursement (R. 705-706). The trial court also permitted to be received in evidence, over objection, Plaintiff's Exhibit 23 which was a reply by Mr. Barth to plaintiff's letters wherein Mr. Barth advised plaintiff that Captain Goldberg had assured him that a purse of $100 would be collected within the next few days and forwarded to plaintiff immediately (R. 707). Although the demands made by plaintiff in these letters were very modest, and although he stated therein that he was not suffering too much discomfort from his injury and had incurred only $20 expenses for medical attention, and Mr. Barth's reply assured plaintiff

that $100 would be collected and sent to him, the serious harm that resulted to the defendants' cause from the admission of these letters into evidence is that it tended to indicate a recognition of some liability on the part of the defendants, although Mr. Barth's letter definitely stated that his offer to obtain $100 for plaintiff was merely "a good will offer" (R. 707). Mr. Barth's letter also stated that he felt that plaintiff was entitled to some compensation from the defendants, "even though they are not legally liable" (R. 707). The defendants objected to the admission of these letters on two grounds, (1) that they related to the question of compromise and (2) that Barth's recitals were not binding against the defendants (R. 117). We respectfully submit that the reception of these letters in evidence greatly prejudiced the defendants' case, because an offer of payment is always subject to misconstruction by the jury as an admission of liability, and it is well settled that unsuccessful efforts at compromise or settlement are not admissible in evidence. *Hammond Packing Co.* v. *Dickey,* (C. C. A. 8) 183 Fed. 977, 977-978; *Paulin* v. *Howser,* 63 Ill. 312, 314-315; *Hill* v. *Hiles,* 309 Ill. App. 321, 330-331, 32 N.E. (2d) 933). Moreover, the smallness of the amount offered ($100) must clearly have inflamed the jurors against the defendants, especially since plaintiff was permitted to prove that he never received any part of it (R. 112).

The opinion of the Court of Appeals states that the admissibility of these letters between plaintiff and Mr. Barth "was not soundly challenged" (R. 823). The record shows, however, that these letters were objected to on the specific grounds that they constituted correspondence between plaintiff and a person (Mr. Barth) not a party to the cause, and could not bind the defendants because they were not written "at the instance of any of the defedants

in this case, nor in representation of them", and that they related "to the question of compromise" (R. 117).

We submit that the reception in evidence of this correspondence greatly prejudiced the defendants' case and constituted reversible error. In this connection, the sum of $100 which plaintiff demanded in these letters contrasts strangely with the verdicts aggregating $100,000 returned by the jury and affords additional and unquestionable proof of the passion and prejudice of the jury.

N.

The trial court also erred seriously in receiving in evidence, without limitation, and over defendants' objection, all of the identification papers (Plaintiff's Exhibits 5 to 19) found on plaintiff's person after his arrest, shooting and search. They were cumulatively prejudicial and, in any event, should have been admitted with the limitation that they had no bearing on the legality of the arrest, shooting and search, and were relevant only to the subsequent conduct of the defendants.

The trial court admitted into evidence all of the identification papers found on plaintiff's person when he was searched after his arrest and shooting (R. 115). These consisted of 15 separate documents each cumulatively showing that plaintiff was not "Nick" the armed robber but William G. Bucher of Tulsa, Okahoma (Plaintiff's Exhibits 5 to 19, R. 700-704). The Court of Appeals, in holding that all these papers were properly admitted in evidence, stated that the defendants did not object to their reception in evidence without limitation (R. 823-824). The record shows, however, that the defendants objected to the admissibility of the identification documents on the specific ground that there was no issue in the case as to mistaken

identity, and that these documents were found on plaintiff's person *after* the arrest and the shooting (R. 115). The trial court said that these documents which were in plaintiff's pocket "were sources of identification which a police officer, in exercising ordinary care, ought to examine and act upon. I think they are material. They may be received" (R. 115). When counsel for the defendants objected that these documents were found *after* the shooting and the arrest, the court declared that the defendants did certain things to the plaintiff after they found the documents on his person and that such conduct was "outrageous" (R. 115). In these circumstances, it became the duty of the court to instruct the jury (irrespective of whether the defendants tendered such an instruction or not) that these documents of identification found on plaintiff's person after the arrest and shooting were not competent on the issue of the lawfulness of the arrest or the justification for the shooting but should be considered only with reference to what took place after such documents were found on plaintiff's person. The defendants made a full and complete objection to these documents, and if the court felt that they were admissible for some purpose, its ruling on their admissibility should have been properly limited and the jury instructed to consider these documents in the light of their limited admissibility. This is not a case where defendants failed to object. On the contrary, their objection was specifically addressed to the point that the documents were not relevant to what took place prior to their discovery on plaintiff's person.

Moreover, the admission of fifteen (15) documents of identification (Plaintiff's Exhibits 5 to 19, inclusive; R. 700-704) was unnecessarily cumulative, and was calculated to and did create passion and prejudice against the arresting officers and againse all the defendants. It was in the

course of the argument as to the admissibility of all these identification documents that the trial court attacked the conduct of the defendants as "outrageous" (R. 115). They manifestly must have aroused anger in the jury also. Assuming that it was proper to receive evidence of identification to show that defendants must have learned who plaintiff was after they searched him, no more than one or two documents would have been enough to show that fact, especially since the defendants conceded that they knew that plaintiff was not "Nick" after they searched him, found no gun on his person, and learned from papers on his person that he was William Bucher. Thus the trial court erred in two serious particulars in this connection to the great prejudice of the defendants: (1) It permitted the issue of mistaken identity to be accentuated beyond all reasonable proportions. (2) It failed to caution the jury to consider these documents only with reference to what took place after they were found on plaintiff's person, and that they had no relevancy to the issue of the legality of the arrest, shooting or search.

By permitting all these exhibits to be received, the trial court in effect emphasized a fact favorable to plaintiff's cause (upon a matter not even in issue) to the great detriment of the defendants. It was within the power of the trial court to limit the introduction of this cumulative evidence (*Royal Exchange Assurance* v. *Graham & Morton Transportation Co.*, (C. C. A. 7)) 166 Fed. 32, 39), and, in fairness to the defendants, it should have done so. In principle, this is analogous to a situation where the trial court instructs the jury in a way so as to favor one party as against the other. In *Home Insurance Co. of N. Y.* v. *Consolidated Bus Lines*, (C. A. 4) 179 Fed. (2d) 768, it was held (pp. 772-773) that it was reversible error for the trial court, in its charge to the jury, to emphasize the facts

favoring one side's case to the detriment of the other. An examination of the trial court's charge to the jury in the case at bar will reveal that it is heavily weighted in favor of the plaintiff and against the defendants (R. 671-687).

O.

The verdicts of the jury are so grossly excessive that the entry of judgments thereon by the trial court and the affirmance of such judgments by the Court of Appeals constitute a clear abuse of judicial discretion.

The issue of the gross excessiveness of the verdicts was raised in the trial court by Ground 19 of the motion of the defendants for a new trial (R. 779). We have already set out the evidence which we believe clearly establishes that the jury verdicts were not merely moderately excessive but grossly so. While the Court of Appeals concluded that it had the power to review the question whether the trial court abused its discretion in failing to grant a new trial because of an excessive verdict (R. 827), it held that the verdicts were not so grossly excessive as to be beyond "the bounds of tolerable conclusion" and that, therefore, the trial court did not abuse its discretion in refusing to set the verdicts aside (R. 828-829). In so holding, the Court of Appeals, it is respectfully submitted, failed to accord proper weight to the great disproportion between the actual damages proved and the huge size of the verdicts rendered. The Court of Appeals was apparently of the opinion that it could not hold the verdicts unduly excessive because they consisted "in greater part" of punitive damages as to which there was no definite unit of admeasurement (R. 828, 830). However. as we have already pointed out, there was no basis in the evidence for an award of punitive damages at all and, even if there were, the

amount awarded was so disproportionate to the amount of actual damages sustained, so greatly in excess of the penalties imposed by the criminal code for similar conduct, and so brutally oppressive in view of the financial capacity of the defendants, as to violate the well settled principles governing the imposition of punitive damages.

Moreover, the Court of Appeals attached altogether too much weight to the trial court's ruling denying the motion of the defendants for a new trial on the ground of the gross excessiveness of the verdict, especially in view of the unseemly and unwarranted hostility displayed by the trial court toward the defendants at an early stage in the proceedings (R. 115-116). In these circumstances, it becomes a matter of fundamental justice that the issue of the monstrous character of the verdicts and judjments rendered against the defendants be subjected to the scrutiny of this court.

P.

The verdicts are clearly the result of passion and prejudice and should not be permitted to stand.

The passion and prejudice of the jury is clearly shown by the huge size of the verdicts as compared to the much lesser amount of compensatory damages shown to have been sustained, even if we assume that the conduct of the defendants was wrongful. The huge assessment of punitive damages under each count is an unmistakable indication that the jury was actuated by passion and prejudice in arriving at its verdicts. As to Count II, the verdict was even larger than the *ad damnum* (R. 28, 772), and larger than what plaintiff's counsel asked the jury to assess (R. 636). However, the size of the verdicts constitutes but the end result of a trial which was frequently

punctuated with intemperate remarks by the trial judge much of which seeped down to the jury, the slanted language of the jury instructions which were so worded as to constitute accusations against the defendants instead of impartial statements of the law (R. 671-686), and the improper arguments of plaintiff's counsel to the jury which were in the main an appeal to passion and prejudice (R. 620-636). Plaintiff's counsel repeatedly inflamed the jury by accusing the entire Chicago police force as corrupt, and by directing the passion so engendered against the particular defendants in this case (R. 624, 670). The citation of one decision by this court will suffice to establish the principle that a verdict based upon passion and prejudice will not be sustained.

In *Minneapolis, St. Paul & S. S. M. Ry. Co.* v. *Moquin,* 283 U. S. 520, 75 L. Ed. 1243, plaintiff recovered a judgment for damages entered upon the verdict of a jury. The trial court granted a new trial, unless plaintiff would file a remittitur of a portion of the verdict. Plaintiff did so and the trial court entered judgment for the balance. This court held, however, that since the verdict was based upon passion and prejudice, it could not be cured by a remittitur. This court reversed the judgment, saying (p. 521-522):

> "In actions under the Federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice. Obviously such means may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent."

It is respectfully submitted that the verdicts here were clearly the result of passion and prejudice and should be set aside.

II.

The questions presented by this petition are of general and far-reaching importance and fully warrant the exercise by this court of its certiorari jurisdiction.

We need not burden this court with a further enumeration of the legal questions which are involved in the case at bar. Their great and far-reaching importance is also self-evident. We believe that it is difficult to find another case in which so many important questions of law have been so wrongly decided and so urgently require the consideration of this court. The judgments here are brutally harsh and oppressive, are wholly without either factual or legal foundation, and represent a serious miscarriage of justice brought about by passion and prejudice and numerous errors of law.

Conclusion.

It is accordingly respectfully submitted that this petition for writ of certiorari should be allowed, and that the judgments of the United States Court of Appeals for the Seventh Circuit should be reversed and the cause remanded to the District Court with directions to enter judgments for these petitioners or, in the alternative, to grant a new trial.

Respectfully submitted,

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